







# SPECIAL PROSECUTOR LEGISLATION



**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIMINAL JUSTICE  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
NINETY-FIFTH CONGRESS  
FIRST SESSION  
ON  
**H.R. 2835 and Related Bills**  
SPECIAL PROSECUTOR LEGISLATION

MAY 18, 1977

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## SPECIAL PROSECUTOR LEGISLATION

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WEDNESDAY, MAY 18, 1977

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIMINAL JUSTICE  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 10:30 a.m., in room 2237, of the Rayburn House Office Building, Hon. James R. Mann [chairman of the subcommittee] presiding.

Present: Representatives Mann, Hall, Gudger, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert A. Lembo and Ashley O. Thrift, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. The subcommittee will come to order.

The subject of today's hearing is special prosecutor legislation. We will be looking at several bills, all of which provide a mechanism for the court appointment of a special prosecutor in certain circumstances.

The subcommittee first began studying special prosecutor legislation late in the 93d Congress. We held extensive hearings, receiving testimony from several Members of Congress; from Acting Attorney General Robert Bork; from several constitutional law experts, including Daniel J. Meador, who is currently the Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice; from the then recently dismissed Special Prosecutor, Archibald Cox; from the then newly selected Special Prosecutor Leon Jaworski; from Common Cause; and from the American Bar Association.

Last Congress we held additional hearings on special prosecutor legislation. We had before us then the House bills providing for court appointment of a temporary special prosecutor, as well as a Senate bill that created a permanent Office of Special Prosecutor within the Justice Department.

The Senate bill originally had provided court appointment of a temporary special prosecutor, but that provision was changed as a part of a compromise worked out with Attorney General Levi.

We received testimony on the House and Senate bill from five Senate sponsors of the Senate legislation; from Attorney General Levi; from Watergate Special Prosecutor Charles Ruff; from the American Bar Association; from this committee's special counsel for the impeachment inquiry, John Doar, and its special counsel to the minority for the impeachment inquiry, Albert E. Jenner, Jr.; from Prof. Samuel Dash, who was chief counsel and staff director for Senator Ervin's Select Committee on Presidential Campaign Activity; and from the American Civil Liberties Union.

The bills introduced this Congress call for a court appointment of a temporary special prosecutor in certain circumstances. Provisions similar to those in the House bills are contained in legislation introduced in the Senate by Senators Ribicoff and Percy, S. 555. The Senate Governmental Affairs Committee, which Senator Ribicoff chairs, has voted to report S. 555 with some amendments. Those amendments, I understand, make changes in the bill's special prosecutor provisions but do not alter the basic thrust of those provisions. S. 555 will now go to the Senate Judiciary Committee for 30 days, after which it can be brought to the floor of the Senate.

Our witnesses today are from the Justice Department, the American Bar Association, and the American Civil Liberties Union. They will appear in support of the concept of a court appointed temporary special prosecutor, and their remarks will focus upon refinements and changes they would like to see in the pending House bills.

They may also be in a position to comment upon some of the changes in the Senate bill.

Our first witness today, is the Acting Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel, John Harmon.

We are pleased to have you here today to present the administration's views on the special prosecutor legislation.

Without objection, your prepared statement, which we each have, will be made a part of our record, and you can proceed as you see fit.

Mr. HARMON. Fine.

**TESTIMONY OF JOHN M. HARMON, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE**

Mr. HARMON. Mr. Chairman, thank you for the opportunity, first, to be here to present the views of the Department of Justice, and as I have indicated, the views of the President as well. His message to Congress on May 3, 1977, indicated his support for the principle of the appointment of a temporary special prosecutor underlying this bill, as well as the bill that is presently pending in the Senate, S. 555.

With your permission, as the prepared statement has been submitted, I would again submit that for the record and simply address myself to two important points, the first being the removal power.

A constitutional question is raised by H.R. 2835's investing the removal power in the special division of the court. It is the strong opinion of the Department of Justice that this would present problems, because of the questionable constitutionality of this removal provision, in any prosecution that may be necessary to be brought by that special prosecutor.

While this is a much debated clause in the bill, it's probably, from the practical point of view, the problem least likely to arise. In view of our recent history with the special prosecutor, removal in anything less than a case of extraordinary impropriety is not beyond the realm of possibility, but very unlikely. However, the provision placing that responsibility—the power of removal—in the courts crosses that line drawn by our doctrine of separation of powers between the executive and the judiciary. It makes the judiciary both perform its function of judgment and, through the removal power and the attendant power

of supervision, in fact, of looking over the shoulder of the special prosecutor. It puts the judicial branch in the position of really having the effective control of both judgment and prosecution.

This is something that's carefully drawn out in case law—the distinction between the two and the division between the two. We have taken the position that because of the extraordinary cases that we are dealing with, we support the appointment of a special prosecutor. In those circumstances, it is proper for the judiciary to participate in the appointment of a special prosecutor.

However, appointment is something distinct from removal. Once the special prosecutor is there, he is only answerable at that time and could only be legally answerable for his conduct to those in whom the power of removal is vested. If that is in the judiciary, we feel that will present a serious constitutional problem and that it would subject the entire mechanism to possible challenge by defendants in a case.

The second point that we feel is most important is an omission in the bill—and we say an absolutely correct omission in the House bill. The Senate bill contains a provision providing for an Office of Government Crimes. The Attorney General and the Justice Department feel very strongly that the House version—this version of the bill, 2835—is the correct approach in not mandating a statutory creation of an Office of Government Crimes.

I tried in my testimony—in my prepared testimony—to outline the reason underlying that, but I again commend this version of the bill and strongly endorse this concept. The responsibility should be where it is now, on the shoulders of the Attorney General and the head of the Criminal Division for crimes in the public sector. The flexibility in the ability to marshal resources of the Department, from whatever quarter, to address those problems as the needs arise, is a necessary component of the effective administration of justice.

There are some eight other modifications of the bill that I have outlined in my prepared testimony. We have had very profitable discussions with your staff—the staff of the committee—concerning those changes, and I feel that we will be happy to continue to work with your staff in reaching agreement on those recommended modifications.

Thank you, Mr. Chairman.

Mr. MANN. All right.

Precisely what mechanism did you suggest—does the administration suggest—with reference to the removal power?

Mr. HARMON. We have supported the mechanism established in the Senate bill, which provides for removal by the Attorney General only on the grounds of extraordinary—in quotes—“extraordinary” impropriety, and providing for a mechanism for judicial review of that removal.

We feel that the added safeguards that are necessary to review the executive branch conduct with respect to the special prosecutor and insulate the special prosecutor from interference by the executive branch are adequately preserved and protected in that approach.

Mr. MANN. Mr. Hall, do you have any questions?

Mr. HALL. Mr. Harmon, why is it assumed that the Attorney General, with all of his staff, could not perform the duties that we are talking about here, of a special prosecutor being appointed?

Mr. HARMON. Mr. Hall, it is not the assumption, certainly not of this Attorney General of this Department of Justice, that it could not and would not exercise the prosecutorial power vested in the executive branch to adequately and forcefully pursue and prosecute any violations of law by any person, no matter what his office.

However, the reason for our support for this bill is that it is our understanding, particularly in light of our recent experience from Watergate and its aftermath, that not only the substance of justice but also the public perception of justice must be safeguarded. The perception that justice is done is often as important as justice itself, and it's solely for that reason that we feel that it is important to establish a mechanism for the appointment of a temporary special prosecutor.

Mr. HALL. Well, is it the Department's understanding that the public perception of justice at this time is at an all-time low and that there is a need for some outside prosecutor to be appointed to overlook and oversee the affairs of the executive department of Government?

Mr. HARMON. Yes; it is.

Right now the perception—not of the Department itself but of this immediate past history—is fresh. It's still fresh in the public mind, and should be. There are lessons to be learned, and we will be working, I'm sure, for the next 4 years, at least, if not longer, to eradicate an image that was attached to the Department of Justice as an institution. And it's to address that problem—that problem of the public perception of justice and the abuses that we perceive and real abuses of the system of justice to which we feel this legislation is addressed—that we support this legislation.

Mr. HALL. And is it your understanding that the public perception of the Department of Justice at this time is low because of the Watergate scandals?

Mr. HARMON. Yes, sir, that's correct.

Mr. HALL. Where do you get that information? Who do you get that information from, that the public perception is so low on the executive department, when everyone connected with it has been convicted? Maybe not everyone, but the biggest portion of them.

Mr. HARMON. I understand that very well. In fact, we are living—we encounter this each day when we are here in the House, when we are in the Senate, and whenever Attorney General Bell is making speeches. There is—Attorney General Bell has called it the Watergate syndrome in the sense of a suspicion, and maybe a healthy suspicion, of this concentration of this exercise of what is properly executive power with the way in which it is being exercised. There have been hard lessons learned, and I think here in the House and in the Senate, that that feeling is certainly there.

The second look that the Congress is now undertaking on different pieces of legislation—other institutional mechanisms, the device of the legislative veto, which is often discussed, often debated, is another attempt to come back in and reassert another check in the system of checks and balances.

Mr. HALL. I realize it's in vogue now for everyone to look with some disfavor upon certain members of the executive and judicial and maybe other areas—but does that call for the establishment of a special prosecutor and all of the staff that goes with that, when your

Department, in its wisdom, is set up constitutionally to take care of these matters?

Now, you realize—I'm not condoning Watergate, but are we going to forever let the aftermath of Watergate determine the existence of new bodies and new agencies, new people to prosecute, when we have a body that's established to do that?

Mr. HARMON. Again, it's the very strong opinion of the Department of Justice, the Attorney General, that the temporary special prosecutor as opposed to the permanent office, which was debated during the last session of Congress, the choice between the two, that in fact this is the correct route to follow. We are talking about the appointment in the extraordinary circumstances as covered by this bill of a temporary special prosecutor—not a permanent staff, not a second Justice Department. I concur wholeheartedly in what I perceive to be the real thrust of your questions now. No, we don't need a second Justice Department. We are not looking for a second Justice Department.

Mr. HALL. But isn't that what you are in reality going to have?

Mr. HARMON. I don't believe so. It's not our understanding of this bill.

In fact, what we are looking for in this bill is the ability to stand back and say, yes, we could and would prosecute in this case. However, because the suggestion of an appearance of conflict of interest—it's not a conflict of interest, it's the appearance of a conflict of interest, or with the judge who is sitting there who knows that he can correctly decide that case, but will recuse himself, even knowing that full well in his own mind he could decide that case—it's also important that to litigants, or the defendant in the criminal case, that he knows, that he believes that justice has been done. It's for that reason that we favor the creation of this mechanism for the appointment of a temporary special prosecutor.

Mr. HALL. Is it your understanding that because of the conflict of interest between the Department of Justice and these people that might come under the purview of this new office is the reason why there should be the creation of this office.

Mr. HARMON. The appearance of conflict of interest, that's correct.

The interest of the President is involved, because, in fact, the function performed by the Department of Justice is a part of the executive function—directed, controlled, and properly so, by the President of the United States—and occurs when the President is the object of the investigation, or the Vice President or the Attorney General.

Mr. HALL. Well, under this bill, does the Attorney General have the final decision as to whether or not there will be a triggering of the appointment of a special prosecutor?

Mr. HARMON. His determination is quite limited. His determination is only that the charges are nonfrivolous.

Mr. HALL. I understand from this report I have been furnished that the action of the Attorney General is not subject to review.

Mr. HARMON. That's correct. But his—

Mr. HALL. On page 3, this decision by the Attorney General is not reviewable—that is, whether or not he thinks there should be any further investigation or prosecution.

Mr. HARMON. His determination that the allegations are frivolous is unreviewable. The purpose for that clause in the legislation was to address the problem of the unfounded allegations. I don't have the figures with me now, but it runs into the hundreds of letters from citizens complaining about and making allegations of misconduct.

Mr. HALL. I understand those things, but the point I'm making, if you are talking about an apparent conflict, if the Attorney General has the final right, which is not reviewable, to make the determination that a matter needs further investigation or that it does not need further investigation concerning any of these people, don't you get back to the same proposition of a conflict of interest?

Mr. HARMON. In that position, for example, if a member of this committee became aware of an alleged violation of the law on the part of one of the people covered by this bill, and he addressed a letter to the Attorney General, went to see the Attorney General, there is an allegation of this wrongdoing in your own mind, in the mind of the person who has made that allegation, that is satisfied, that it is in fact substantiated that he has complaints, he has in his own mind substantiated that evidence, he turns it over to the Attorney General for action. If after the period he learns that in fact the prosecution was not followed, then we are in the process provided under our constitutional form of government of checks and balances, and that person, of course, if he's a Member of Congress, would have the ability here to call the Attorney General to answer his questions.

Mr. HALL. Let's just suppose that the President of the United States is involved, and the Attorney General is called upon to make a decision as to whether or not the information he has calls for further investigation on the subject. Now, his determination of that is final, isn't it?

Mr. HARMON. Correct.

Mr. HALL. It is not reviewable. Does that not get into a conflict of interest, if the Attorney General is going to be called upon to decide whether or not there is enough information to call for a further investigation of the President of the United States? Isn't that going to be a conflict of interest, just like you would have if you didn't have a special prosecutor involved?

Mr. HARMON. His determination is that the charges against the President are not merely frivolous. That, for me—and I think for the intent, again, of the bill—is a determination at a different level from the determination of prosecutorial discretion, of whether, in fact, there is enough evidence to prosecute, to bring an action. That determination is left in the hands of the special prosecutor. It's meant to be an automatic triggering mechanism when a serious allegation is made against the President.

Mr. HALL. Well, looking at the top of page 3 of the analysis of this bill, if the Attorney General determines that the matter under investigation is so unsubstantiated that no further investigation or prosecution is warranted, then the Attorney General so notifies the division of the court. This decision by the Attorney General is not reviewable.

Now, it goes on and says this:

If the Attorney General determines that the matter warrants further investigation or prosecution, or if 60 days elapse without a determination, one way or the

other, the Attorney General must make an application to the division of the court for the appointment of a special prosecutor.

As I read that, if the Attorney General is of the opinion that it is frivolous, it stops.

Mr. HARMON. That's correct.

Mr. HALL. If the Attorney General determines that it is not frivolous or that it should continue, then he makes an application for a special prosecutor.

Mr. HARMON. That is correct.

Mr. HALL. All right.

Now, is it your testimony that you would not get into an apparent conflict of interest with the Attorney General making a determination that is not subject to review about the President of the United States?

Mr. HARMON. But his determination—that in fact this is a non-frivolous allegation—is under this mechanism and under the division; again, we're still operating within the executive branch. This special prosecutor is, even when he was appointed, the resource of the Department of Justice, everything there was available to him. It's still an executive function.

Mr. HALL. I understand.

But the point I'm making is, if the President says—if the Attorney General, "It is a frivolous allegation against the President and, therefore, I'm not going to do anything else about it," it's not reviewable by anyone.

Mr. HARMON. That's right, and which I'm certain will be indicated—

Mr. HALL. Are you saying there is not an apparent conflict of interest at that particular point in this bill?

Mr. HARMON. Again, as a question of degree.

Mr. HALL. An example: Suppose Mr. Mitchell said, "No, Mr. Mitchell is not guilty of anything," and that wasn't reviewable. Do you say that would or would not be a conflict of interest, looking in the past now?

Mr. HARMON. Again, the mechanism for review of that kind of decision is that the Attorney General is not following this law. He's not fulfilling his—

Mr. HALL. But if we had had this law in existence in 1973, and the Attorney General had been called upon to make that determination, which would have been not reviewable, do you say that would or would not have been an apparent conflict of interest?

Mr. HARMON. If he had been called upon to make the determination, and suppose, then, that he had made the determination that this was a frivolous allegation, then in that case he is not following this statute, because—against the evidence very much to the contrary—the allegations were in fact substantial allegations.

Mr. HALL. But under this bill, his actions are not reviewable.

Mr. HARMON. His actions are not reviewable by the court, and the purpose for making it not reviewable by the court is so that in a prosecution, this could not be raised by a defendant saying this matter should have been referred to a special prosecutor, as a defense to a prosecution by the general division being handled there. In fact, he's entitled to that. That's an aside.

To your principal point, it's not reviewable by the court, but it is reviewable by the Congress. It is reviewable. The procedures for impeachment are still available.

Mr. HALL. I understand that.

Mr. HARMON. And will still be available for the Attorney General who does not fulfill his obligation under his oath of office.

Mr. HALL. Whether we have a special prosecutor or not.

Mr. HARMON. That's absolutely correct.

Mr. HALL. That's worked very, very well up to now, has it not?

Mr. HARMON. It has worked.

Mr. HALL. Yes, sir. That's all I have. Thank you.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. Yes; I would like to ask a number of questions that I think are a little less philosophically substantial than those asked by Mr. Hall.

I would like some enlightenment as to your own thinking with respect to the group of individuals or officeholders who might justify this process of appointing a special prosecutor.

For instance, as I understand it, we not only list the President, the Vice President, the Director of the FBI and others who are in clearly responsible positions, but we also get down to level I and level II executive officers.

Mr. HARMON. Yes.

Mr. GUDGER. Do you see any reason why the Attorney General's Office cannot pursue those at level II?

For instance, do you see any actual necessity of triggering this special prosecutor into position for level II executives?

Mr. HARMON. I do not.

Level II—there are certain level II positions that have been specifically mentioned in the Senate version of the bill.

For example, the Deputy Attorney General may be one example of a level II position. The Director of the FBI is a level II.

Please correct me if I'm wrong on that. He's a level III, but it does go to the level III and specifically names the Director of the FBI as an individual picked up for special attention. But level II, the general coverage of level II is an Under Secretary, and it's my—it is the opinion of the Department of Justice that that person is not close to the President. An Under Secretary—there's no presumption or even perception of the kind of relationship between an Under Secretary and the President that would preclude prosecution by the Department of Justice. And for that reason we—and I recommend in my statement, in my written statement, that in fact that limitation, that that circle be more tightly drawn, that there is no need for the blanket coverage of level II executives.

Mr. GUDGER. I have scanned your statement, and I don't think you commented in your opening remarks with respect to this particular area of concern, and I wanted you to develop it a little more penetratingly than I think the statement itself provides.

Mr. HARMON. Fine.

Mr. GUDGER. As to where you think the line should be drawn.

Now, I notice that the bill—and I refer to H.R. 2835—does specifically refer to the Director of the Federal Bureau of Investigation, because, I suppose, he is a level III.

Mr. HARMON. Yes.

Mr. GUDGER. But other than those—and an officer so designated, specially designated here, who has a special responsibility, conceivably there might be one or two other investigative agencies of that same level—CIA and that sort of thing—

Mr. HARMON. Yes.

Mr. GUDGER. That might need to be specially listed here and may not be specially listed in the bill. But when you get out of the investigative agency function, then it is your thought that the Deputy Secretary need not trigger the appointment of a special prosecutor?

Mr. HARMON. That is correct.

Mr. GUDGER. Because it is your feeling that the Department of Justice can certainly deal with that problem?

Mr. HARMON. Yes.

Again, the appearance of conflict of interest.

Mr. GUDGER. I see that the Director of Central Intelligence is in the Senate bill and is specially designated.

Mr. HARMON. Yes.

Mr. GUDGER. So I think I am going to have to do a little more homework with respect to this area of concern and not trouble you with it.

Mr. HARMON. Excuse me for interrupting, but I believe that the correct approach would be to consider specifically the people to whom this bill should be addressed and to not reach out and say level II.

Mr. GUDGER. And apparently the Senate bill does that.

Mr. HARMON. That's right. That's the position I took in my testimony before the Senate committee, and the committee did accept that suggestion.

Mr. GUDGER. Fine.

Now, the second question that I want some enlightenment on is the question of what are to be the acts under investigation which justify the triggering machinery.

Now, criminal conduct and conspiracy to engage in criminal conduct, these are clearly areas which would justify the application for the appointment.

Are there any other areas which would justify the investigative action, short of actual criminal conduct?

Mr. HARMON. We believe that in fact the approach taken in this bill is the correct approach.

We suggest that, perhaps, with respect to the President, the Vice President, and the Attorney General, that maybe any Federal crime may be such that the appearance of conflict will be such as to justify the appointment of a special prosecutor.

However, with respect to other Cabinet members, I think that the real thrust of this bill, and properly so, is to crimes arising out of their public office. If one of the Cabinet secretaries is involved in criminal conduct unrelated—maybe we can broadly define these as public corruption—a crime unrelated to public corruption, totally unrelated, another Federal crime, then in that case it's not necessary to trigger the appointment of a special prosecutor. That person could be prosecuted by the Department of Justice. There is a difference in crimes, and the need for a special prosecutor arises only for a crime arising out of his office. We do see that perhaps there is a need there. However, a crime not arising out of his public office—I won't try to use examples,

because we will start with hypotheticals—but a crime unrelated to a public office, in his private life, somewhere else, that that crime could be properly prosecuted by the Attorney General, by the Department of Justice. And I think that is the approach of H.R. 2835, and I think it is the correct approach.

Mr. GUDGER. I see that the Senate bill refers to it as a violation of any Federal criminal law other than a petty offense.

What about violation of the State laws, or conspiracy to participate in the violation of a State law, where the State law may seem more specific as it relates to election machinery and election activity, for example, than the Federal law?

Mr. HARMON. Well, again, the Department of Justice would have no jurisdiction in the instance of a violation of State law, and that would be up to the State attorney general, whether the State attorney general in the particular State could bring that action.

The conflict, or the appearance of conflict, is not so apparent there. I would see no problem with the attorney general of the State of North Carolina, for example, bringing a prosecution for violation of State law against a Federal official—one of the Federal officials covered by the act.

For that reason I think that our jurisdiction—the jurisdiction of the Department of Justice—is addressed to violations of Federal—

Mr. GUDGER. We're getting a little bit into the criminal law theory of conspiracy, to accomplish an unlawful purpose.

Mr. HARMON. Yes.

Mr. GUDGER. By lawful means, or to accomplish a perfectly lawful end by unlawful means and you may be affecting the outcome of a Federal election by violating certain State laws.

Mr. HARMON. I see. Yes.

Mr. GUDGER. What I'm speaking to now, it could be that the State of North Carolina—you used that State, our State, yours and mine, by way of reference—but I am concerned about the situation where someone in, say, the city of Washington triggers an action which affects the election machinery and the administration of the election laws in the State of North Carolina which, in turn, impacts perhaps upon a Federal election or has that consequence, but it is a direct violation of North Carolina law that we have involved.

If we do not have an extradition-type situation because the person in Washington had never been in the State of North Carolina, therefore, he could not have been guilty of flight to avoid prosecution, so we can get into all kinds of problems which may make that question that I am presenting important, I don't know. I am trying to get your thoughts about it. If it's something you have not related to yet, perhaps we ought to just avoid it now and come back to it later.

Mr. HARMON. No; I think that that particular crime, if you help me with a section here on addressing which crimes are covered, is within the coverage of crimes. There is a specific mention of crimes relating to election violations of Federal law. I'm sorry, I can't put my finger right now on the section.

Mr. THRIFT. Section 591(a).

Mr. HARMON. Violating any Federal criminal law regulating the financing or conduct of elections or election campaigns.

I think, in the example that you have given, that this will be broad enough. If there was a violation of Federal law and the Federal Election Act and the conspiracy violation of State law which, in turn, was a violation of Federal election law, then we would be within the coverage of this act, if I have your point.

Mr. GUDGER. Well, I think it's a point that I wanted to have in the record, and I think we will pursue it later, if we have time.

Mr. HARMON. Fine. I'll certainly be pleased to answer any further questions.

Mr. GUDGER. I notice that you comment upon the fact in your remarks here, in your typed script, that possibly the 30-day time is not sufficient to allow the preliminary investigation that the Attorney General would need to—

Mr. HARMON. The 60-day period is provided now in the bill—a 60-day period.

Mr. GUDGER. A 60-day period?

Mr. HARMON. That's correct.

We have looked and tried, and again, this is something in the expertise of the Criminal Division, but in fact some of the allegations are such that to follow leads more than 60 days might be required. We simply are seeking the flexibility to seek an extension of another 30 days to be able to investigate and determine whether in fact the allegations come within the category of a frivolous allegation, whether it is substantiated.

Mr. GUDGER. The reason I pursue this point is that I think you are in a position to enlighten us, as to the speed of this type of investigation. The members of this committee and I may have no experience in directing this type of investigation—the election fraud concern at the Federal level—and I assume that there is some basis for this suggestion that 90 days is more realistic. I assume that the Attorney General could act within 60 days if he had the evidence.

Mr. HARMON. That's right; and he clearly would.

As a matter of fact, in some of the past examples of cases that might fall within the jurisdiction of the special prosecutor under this bill, clearly, the allegation would be the allegation of wrongdoing would be apparent, perhaps, on its face or apparent, with very little investigation; that it was substantiated and would not be in the frivolous category and he could certify immediately to seek an appointment of a special prosecutor.

Mr. GUDGER. One final question, if I may, following up the concerns that Congressman Hall has expressed—

Mr. MANN. I hope you can recall the question when we get back. The House has a rollcall vote on the rule on the National School Lunch Act, so we will recess for 12 minutes for the purpose of voting. Thereafter, we should have an uninterrupted period of an hour or more, and I hope the subcommittee can return.

The subcommittee will stand in recess for 12 minutes.

[Recess.]

Mr. MANN. Mr. Gudger, you may proceed.

Mr. GUDGER. Mr. Chairman, I believe my interest prior to this vote was addressed toward the question of the Attorney General's having the power to recommend appointment and to undertake the routine investigation and the other functions. Then when he deter-

mines that there is a situation where this special prosecutor is needed, he then turns over the appointment of that special prosecutor to this judicial panel.

Mr. HARMON. Correct.

Mr. GUDGER. Now, as I understand it, when there is to be a removal under the present bill, that function would be performed by the judicial panel. But under your recommendation, it would be by the Attorney General?

Mr. HARMON. By the Attorney General, that's right.

Mr. GUDGER. But I believe you recommend that the Attorney General's removal be subject to judicial review?

Mr. HARMON. We could accept that. Because there is a standard set for removal in cases of extraordinary impropriety, and because of the special circumstances surrounding the entire process, we believe that it would be a proper exercise of judicial review for the judiciary to review whether that standard had been met in the Attorney General's statement of his reasons for removal.

Mr. GUDGER. But isn't this judicial review of this executive act subject to the same complaint of a failure of separation of powers that you use as your motive for suggesting that the power of removal not remain in the appointing judicial body?

Mr. HARMON. I think you are correct in a sense that we really are talking about a question of degree, and the same argument could be made of any limitation upon the removal power.

Mr. GUDGER. One thing that troubles me about this entire bill is the fact that we have gone for 200 years, operating under a Constitution, the framers of which did not presume misconduct on the part of high, elected officials, and it has worked.

We have had one instance in our history in which it was necessary to deal with a special problem beyond the machinery drawn into our Constitution. Why do we need now to presume misconduct at this level, when the framers did not?

Mr. HARMON. I hope that we are not presuming this conduct. I hope that the purpose of this legislation is to provide a mechanism to deal with that possibility.

Again, the reason we are facing this legislation—it deals with the employment of a temporary special prosecutor. We are not establishing and would not favor establishing a permanent office that would stand there. This mechanism will be in place to preserve and protect not only justice itself, but also the appearance of justice. A mechanism would be available to the Attorney General and to the President, as much for their protection, if you will, as for the protection of the legislative branch or the people themselves in the sense that this ability to take this matter and make sure it is treated in the eye of the public and the eye of the Congress and everyone else on a detached basis.

Mr. GUDGER. Why is not the extent of the investigation by the special prosecutor as broad as grounds for impeachment, rather than so narrow as criminal misconduct?

Mr. HARMON. Because the function of the special prosecutor is prosecution of violation of Federal law. Impeachment is that power—that power is reserved to the Congress, and this office—this special prosecutor—is acting not for the Congress, but for the executive branch.

Mr. GUDGER. And you do not see him rendering any resource to the Congress that passes this act?

Mr. HARMON. I do not.

Mr. GUDGER. You've cleared up quite a lot, Mr. Harmon. I'm grateful to you for your testimony.

Thank you, Mr. Chairman.

Mr. MANN. Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

The Attorney General now possesses the power to appoint a special prosecutor when that appointment is deemed to be necessary, does he not?

Mr. HARMON. That's correct.

Mr. WIGGINS. He also has the power to define the jurisdiction of that special prosecutor appointed by the Attorney General?

Mr. HARMON. That is correct.

Mr. WIGGINS. And to yield such power and duties and authority as the Attorney General wishes to the special prosecutor?

Mr. HARMON. That's also correct.

Mr. WIGGINS. I suppose at the present it is agreed that the authority of the Attorney General is either broader—well, at least as broad as the act. It is narrower only in the sense that the act envisions doing away with the power of removal, which you, of course, object to on constitutional grounds.

But if that special power of removal is taken from the bill, the only thing, really, you need about this bill is the involvement of judges in the appointment process, as distinguished from the Attorney General, and a special trigger is necessary for the appointment of a special prosecutor when the specific individuals are involved.

Mr. HARMON. I think that's an accurate analysis of the bill.

Mr. WIGGINS. I'm certain that the present Attorney General would exercise his inherent authority. Now, if the occasion presented itself where it would either be or appear to be improper for the Attorney General to proceed with prosecution of specific individuals—and I notice that he has not appointed any special prosecutor today—

Mr. HARMON. No.

Mr. WIGGINS. Why hasn't he done so in the case of Louisiana?

Mr. HARMON. Because there he's determined that there is neither actual nor apparent conflict of interest in the Justice Department proceeding with that case.

Mr. WIGGINS. If the act were in place, would he be compelled to appoint a special prosecutor in the Louisiana case?

Mr. HARMON. No. Compelled, no. No, he would not be compelled to appoint a special prosecutor, as I read the act.

Mr. WIGGINS. Do you clearly agree that the political party of the President would be implicated, do you not?

Mr. HARMON. Yes, the political party of the President, of course, is implicated. It would be implicated in any instance in which a Democrat is under investigation or prosecution—and I assure you that those instances go far beyond Louisiana.

Mr. WIGGINS. Well, in this case, the Attorney General has made a subjective determination that the political party may be implicated, but the extent of its implication is not such as to make it inappropriate

ate for the Department of Justice to proceed with the conduct of a prosecution.

Mr. HARMON. Yes.

Mr. WIGGINS. Why haven't you appointed a special prosecutor in the case of the Korean investigation, under your present authority?

Mr. HARMON. Because, again, there the Attorney General sees no conflict or appearance of conflict in the prosecution of that case, and believes that the perception of justice being done can be effectively carried out by the Department of Justice in this case.

Mr. WIGGINS. If this act were in place, would he be compelled to seek the appointment of a special prosecutor?

Mr. HARMON. Under my interpretation of this bill, he would not.

Mr. WIGGINS. Well, at the moment that's the only scandalous conduct that comes to mind. Do you have anything else in mind?

Here we have alleged misconduct touching upon officials of the Government, all of whom have certain political connections, but the Attorney General under his present power has not appointed a special prosecutor. And it's your testimony that under the bill, he would not find it necessary to do so in such cases?

Mr. HARMON. Well, yes, because he has that discretion now. Under the bill, he declines to exercise that discretion. You are correct.

Mr. WIGGINS. What kind of unique case would it take then for the special prosecutor to be appointed?

Mr. HARMON. Without this bill, or with this bill?

Mr. WIGGINS. Well, either one, because I think they really pretty much track each other as long as the threshold decision must be made by the Attorney General.

Mr. HARMON. Well, this Attorney General testified at his confirmation hearing that he could prosecute the President and would have no trouble doing so. Whether he would do so under the principle of this bill and its standard of the appearance of impropriety—clearly, he would not. That would be a case for a special prosecutor.

Whether, in fact, in a case involving a Cabinet member, this Attorney General would exercise his discretion to appoint a special prosecutor, whether he would feel that at least the appearance of a conflict of interest was so prevalent that a special prosecutor should be appointed, I think that's a question that would depend upon the fact of the situation.

Clearly, as a rule, with regard to an Under Secretary, for example, I know that this Attorney General would feel that there would no appearance of conflict of interest to justify a resort to a special prosecutor. There may be a particular case, but again, he would still have that discretion to appoint a special prosecutor where he saw fit, regardless of the position.

Mr. WIGGINS. I notice in the bill that if the Attorney General seeks to apply to the courts for the appointment of a special prosecutor, he keeps that secret. He won't tell anybody about it.

Mr. HARMON. That's right. And we think that's important.

Mr. WIGGINS. Surely, the President ought to have a right to fire the poor guy before he finds he's under investigation.

Mr. HARMON. Yes. And the Attorney General acts only pursuant to his power derived from the President. The prosecutorial function derives from the President.

Mr. WIGGINS. Well, let's suppose the Attorney General went into the oval office one day and told the President about some alleged misconduct involving the Vice President. And he was going to go to the special prosecutor. And the President says, "You're fired if you do it."

Now, we don't have an Attorney General any more; we have a Thursday afternoon massacre. They fire the man rather than let him exercise the power contained in the bill.

Mr. HARMON. That's right.

Mr. WIGGINS. Doesn't that seem to subvert the kind of public confidence that this bill has as its basic purpose of achieving?

Mr. HARMON. The bill—

Mr. WIGGINS. He could fire the AG.

Mr. HARMON. The bill cannot and does not deal with the question of a dishonest President, a dishonest Attorney General. Again, and I have tried to make this reference earlier, the impeachment power has worked and it will continue to work. The impeachment power is in this House and in this committee, especially.

Mr. WIGGINS. Whether we have the bill or not.

Mr. HARMON. Whether you have the bill or not. And for the case of the dishonest Attorney General or the dishonest President, that's where the power lies, where the power will be exercised.

Mr. WIGGINS. Well, I don't know that the President would be dishonest for disagreeing with the views of his Attorney General on a matter so sensitive and affecting his administration, but he might simply disagree fundamentally with the man, and think it better to have his chief law enforcement officer be more compatible with his point of view in occupying the role of Attorney General.

Mr. HARMON. The point that you make—excuse me—I understood the example that you were referring to is that when there had been an allegation operating under this bill, an allegation of wrongdoing, and the Attorney General had determined that it was substantiated and was referring it to a special prosecutor and he was going forward with that action, as he would be obliged to do if this bill became law.

In that case, when you question whether it's judgment call, it would not be in this case. He would be obligated under law to make that reference, and the President still is not free to violate the law.

Mr. WIGGINS. Well, this President may be willing to yield part of his executive authority by signing this bill, but the next one may feel a little differently about it.

I think the reality is that the President, as the chief executive officer of this country, will always have the power to interdict this process by firing enough people, subject only to being called to account by the House of Representatives. He can replace Attorneys General.

Mr. HARMON. Yes.

Mr. WIGGINS. At his own will, he can.

Mr. HARMON. And as he probably should.

Mr. WIGGINS. That's right. And I think he should too. I wish I better understood the real need for this bill. I think I can understand the political implications of such a bill; but in the great sweep of American history, I am yet to be sold on the need for this kind of legislation, which would without question both intrude upon historic Presidential authority and confer a novel authority on the judiciary.

We are juggling the power relationships, perhaps modestly, but we are juggling these power relationships as a result of adoption of this bill.

And I think that those who wish to upset the status quo carry some burden or justification for doing so. And it is not sufficient, in my opinion, for the representative of the Department of Justice or my colleagues who sponsor the bill, to come in and say we are doing this because of the public perception. That's not enough for me.

The public is going to fully perceive reality. And if this Attorney General conducts himself in a lawyer-like way, the public perception of his performance will be good. He won't have to worry about this. And if he does not, then there are tools to deal with that, without this image-making device contained in the bill before me.

I really think this is a bastard son of Watergate. And we had best stop this child early in its evolution—what's a good word?—nip this idea in the bud, is what I mean to say.

Mr. HYDE. In its gestation.

Mr. WIGGINS. Abort it. In any event, I am not at all impressed with the public need for this, other than imagery, and that's a pretty shaky reason for it.

Mr. MANN. Mr. Hyde?

Mr. HYDE. Thank you, Mr. Chairman.

Mr. Harmon, on page 13 of your testimony, you say,

We believe that proposed section 595(e), allowing Congress to request the Attorney General to apply for the appointment of a special prosecutor or to explain his failure to do so, should be eliminated.

Without Congress having the right to request the Attorney General to apply for the appointment of a special prosecutor, it remains pretty much in-house then, doesn't it, in the executive department?

Mr. HARMON. The obligation of the Attorney General under the bill would be as it is defined where there is a nonfrivolous allegation. It's meant to be an automatic triggering device.

If the Attorney General obeys the law, and again, as I have said this, this bill assumes an honest Attorney General, it assumes a law-abiding Attorney General, someone who will fulfill his oath of office, then that reference to the court for appointment of a special prosecutor would be made under the bill.

The reason for our opposition to the section allowing the Congress to request the appointment of a special prosecutor again goes to the point that I have tried to address. It's a recurring point throughout our discussion of the bill, the doctrine of separation of powers. Prosecution is uniquely an executive function, reserved by the Constitution to the executive branch. The possibility of Congress, the elected branch, entering into the decision, the prosecutorial process, we feel would be not only a dangerous inroad on a Constitutional principle, but unconstitutional.

Mr. HYDE. Do you not distinguish between the prosecutorial process and the getting of the process started, initiating the process, such as seeing that a prosecutor be appointed so the process may begin? Or do you think—or would you suggest the process begins when the suggestion that the Attorney General seek a court order to appoint one—you say that's the prosecutorial process?

Mr. HARMON. That is our position. The beginning of the prosecutorial process, yes.

Mr. HYDE. Did you review at all any bills other than 2835? I see your testimony is only directed to that. But I have a bill introduced, 2711. Did you look at that at all?

Mr. HARMON. I have had a chance to review the particular section 2711 of your bill which addresses this question.

Mr. HYDE. And which permits and authorizes a majority of the minority to request the appointment of a special prosecutor. Now, the rationale for that should be self-evident. You've got a one-party operation here; you've got the same party in charge of the executive, overwhelmingly in charge of the executive; the same party in charge of the legislative—overwhelmingly in charge of the legislative—and the checks and balances that Watergate provided aren't there any more. And you get in-house, in-house, in-house.

Now, this Government is founded on checks and balances, however we view them. And it just seems to me that this would be very useful, if a majority of the minority thus guaranteeing that it wouldn't be frivolous; it wouldn't be an aberrational complaint or fixation by somebody—ought to have the authority to request, just request, that this machinery get started.

I take it, if you don't want Congress to do this, the same reason would apply to the minority of the Judiciary Committee having the same authority.

Mr. HARMON. That is correct. And it is our view that that need would apply to every prosecutorial decision and that in fact, as you well point out, that Attorney General Bell is in charge of this Justice Department and that applies to all prosecutions, and the President is in charge of the executive branch, and the ultimate authority for prosecution.

That power is derived from the President's power to see that the laws are faithfully executed, and that power is vested in the executive branch. Those decisions are vested in the executive branch.

The problem which I think your proposal attempts to address is the problem, as you say, of the minority view—of having the minority view expressed when prosecution should be proper. And again, we see that as a problem of the Congress and of the public. We still have the first amendment; and we shall have the first amendment to express that concern, and that concern may be expressed in oversight hearings, again with the ultimate power residing in this House for impeachment.

Mr. HYDE. You see, the very point of having a court appoint a special prosecutor is to relieve the Attorney General of the delicate burden of having to prosecute some high official in the House, although that's only covered in my bill, not the other one, which is another matter I would like to get to.

But some cabinet members or some ambassador who was a very substantial contributor to the party—I see some of those have been appointed—we are presuming an honest Attorney General and an honest President. Can we presume that for all time, given the experience we have just had? I'm not referring to the incumbents at all. I stipulate they are honest men.

But I am saying, haven't we learned that human beings are human beings and that this sort of—the thrust of it or the inspiration for it is simply to provide means whereby people who have a grievance—a

public grievance—can get efficient, objective administration of justice?

Mr. HARMON. The laws and the Constitution itself are written for honest officeholders. The mechanism—our governmental mechanism is established for honest officeholders.

Mr. HYDE. Weed out the crooks.

Mr. HARMON. I would differ with you respectfully. I don't see the objective or the goal of this legislation as to weed out the crooks. The goal is to assure again an independent consideration of all the facts and the appearance thereof. And again, to assure the appearance that a considered independent decision is made on a prosecution.

Again, that power is within the executive; and the weeding out the crooks—again, that power is given to the Congress through the impeachment powers of the Constitution.

Mr. HYDE. Let me—just one more thing. What we read in the papers—whether it's true or not—of some abrasiveness between the Speaker of the House and the President—the relative prerogatives of the two branches. Now, whether it's true or not, we have heard about it and it's been talked about, and Jack Anderson this morning talked about it at great length, and Martin Agronsky.

Supposing a member of the leadership of the House were involved in corruption rather extensively; would it be useful to have in place a mechanism to appoint a special prosecutor for that? In other words, what I am saying is that Members of Congress—if we are going to have a cabinet and we are going to have to go after the Vice President, what about Members of Congress? Shouldn't they be prosecutable under any special prosecutor legislation? The political sensitivity is just as tough, you know, for going after the Secretary of the Treasury as I would say for going after one of the leaders of the House.

Mr. HARMON. I don't think so. The connection again is their relationship to the President. This is, as I see it, the theory, the principle, the logic behind the bill—what people are to be covered, what is their relationship to the President? The President after all still reserves the ultimate power of prosecution. Since that derives from the President, the relationship to the President is the key.

Within the executive branch, the people who serve under the President—and that has been the thrust of this bill, to address those people—those people who by position, by their relationship with the President, under his control, might be perceived to be acting, again, in the stead of the President. And because that prosecution goes so close to home, it's as if the President is prosecuting himself. In that case, in order to avoid the appearance of a conflict of interest, there should be a special prosecutor.

On that reasoning, this would not cover Members of the House, Members of the Senate, Members of the Congress.

Mr. HYDE. I have no further questions.

Mr. MANN. Thank you, Mr. Harmon. You have been very helpful. [The prepared testimony of John M. Harmon follows:]

STATEMENT OF JOHN HARMON, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the committee, I am pleased to appear today to provide the views of the Department of Justice on H.R. 2835, the Special Prosecutor Act of 1977.

We support the establishment of statutory procedures for the appointment of a temporary special prosecutor. The President also supports this approach as he indicated in his message to Congress of May 3, 1977.

Our support for the bill should not be misunderstood by this committee or by the American people as any indication that the Department of Justice cannot or would not forcefully and effectively prosecute even the highest officials of the executive branch where there was evidence of criminal wrongdoing. To the contrary, our first duty is to our first client, the American people and the Constitution. And let there be no question that this Department of Justice stands ready to enforce the laws of the United States, fairly and firmly, against all who would violate those laws, no matter what their office or position.

However, we recognize that public perceptions and the appearance of justice are often as important as justice itself. We also recognize that in light of Watergate and its aftermath public confidence in our system of justice must be restored. We must not only do justice, but be able to assure the public that justice has been done. It is in this spirit that I come here for the Department of Justice to support the principles underlying H.R. 2835.

There are, however, particular aspects of H.R. 2835 which either pose constitutional problems or which would be detrimental to the fair and efficient administration of justice. While the Department generally supports the proposals here, we believe that the deletion or modification of certain problematical provisions will result in a bill which is both more workable and less subject to constitutional objections.

In essence, the bill provides for judicial appointment of a temporary special prosecutor in instances where the Attorney General receives a nonfrivolous allegation that certain specified persons have violated certain Federal criminal laws. More particularly, the bill requires the Attorney General to conduct an investigation whenever he receives "specific information" that the President or Vice President, individuals serving at level I or II of the executive schedule, certain high-level officials working in the Executive office, the Director of the FBI, and certain campaign personnel have violated specified criminal laws. If, after a period not to exceed sixty days, the Attorney General determines that the "matter is so unsubstantiated that no further investigation or prosecution is warranted," he shall so notify a special court of three judges chosen by the chief judge of the United States Court of Appeals for the District of Columbia; the court would then have no power to appoint a special prosecutor. If, however, the Attorney General finds that the matter warrants further investigation or prosecution (or 60 days elapse without any determination by the Attorney General), he is required to apply to the court for appointment of a special prosecutor. This same action is required of the Attorney General where he determines that a pending investigation or any resulting prosecution "may so directly and substantially affect the political or personal interests of the President or the Attorney General or the interests of the President's political party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such investigation." Upon receipt of the Attorney General's application, the court is required to appoint a special prosecutor and to define the special prosecutor's jurisdiction.

The special prosecutor is given broad power to hire a staff, to conduct investigations and prosecutions, and to secure access to pertinent Department of Justice records and resources. He is obliged to submit reports to Congress and to "cooperate with the exercise of . . . oversight jurisdiction" by the appropriate committees of Congress. He may be removed from office, other than by impeachment and conviction, by the special court and only for "extraordinary impropriety" or similar conduct. The bill also provides for the termination of the special prosecutor's office upon the completion of its assigned tasks.

As I have already indicated, the Department of Justice endorses the concept of resort to a temporary special prosecutor in extraordinary circumstances. We also support much of the general approach adopted in this bill. The Department has no objections, for example, to the manner in which the appointment process is initiated or to the method of judicial appointment.

We must object, however, to the provision allowing for judicial removal of the special prosecutor. We believe that this provision raises serious constitutional questions which may provide a defense to prosecutions brought by a special prosecutor and which are best avoided. This is particularly so since other provisions of the bill, as well as the public review which would accompany any removal of a special prosecutor, should serve to protect the independence of the special prosecutor.

We believe, first that the vesting of the removal power in the courts would impose upon them a role inconsistent with their constitutional function. Even though the courts might be vested with the power of appointment in certain narrowly circumscribed cases, the same arguments do not necessarily apply with respect to the power of removal. The latter inevitably implies some degree of control or supervision over the Special Prosecutor's activities, a function which may not properly be vested in the courts. Judge Learned Hand cautioned against such a development:

"Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945).

Judge Gesell, in addressing this issue in the context of the same situation which has given rise to the present bill, shares this conviction:

"Although these are times of stress, they call for caution as well as decisive action. The suggestion that the Judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor, for example, is most unfortunate. Congress has it within its own power to enact appropriate and legally enforceable protections against any effort to thwart the Watergate inquiry. The Courts must remain neutral. Their duties are not prosecutorial. If Congress feels that laws should be enacted to prevent executive interference with the Watergate Special Prosecutor, the solution lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular Court." *Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973).

There is also considerable case law support for the position that placing the power of removal in the courts would infringe on the constitutional prerogatives of the President. The President is entrusted by the Constitution with the obligation to "take Care that the Laws be faithfully executed." Article II, section 3. The Supreme Court, relying on this constitutional responsibility, has made clear that the enforcement of the law is entrusted to the Executive Branch alone. *Buckley v. Valco*, 424 U.S. 1, 138-40 (1976). See also *United States v. Nixon*, 418 U.S. 683, 693 (1974).

In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court relied on this rationale in holding that the President had authority to remove an Executive official appointed by him notwithstanding statutory attempts to restrict his power of removal. The Special Prosecutor will be an officer of the executive branch exercising an executive function. Control over the executive branch and executive functions is placed in the President. To fulfill his constitutional responsibility to take care that the law be faithfully executed the President must be able to supervise those officials exercising significant authority and wielding substantial powers; the Special Prosecutor, vested with almost all the powers of the Attorney General under this bill, must be regarded as an official operating within this authority. Prosecution is the responsibility of the executive and not the judicial branch.

We would urge that the provision providing for judicial removal of the Special Prosecutor be deleted. If the House wishes to insure the independence of the Special Prosecutor, we would suggest that the approach adopted in the Senate bill, S. 555, effectively accomplishes this goal. The Senate bill vests the power of removal in the Attorney General, but allows removal only in the case of extraordinary impropriety or similar conduct. It further ensures the Special Prosecutor's independence by allowing court review of any removal by the Attorney General and requiring a report by the Attorney General to the Congress. These restrictions, together with the political and public pressures that would accompany any removal of the Special Prosecutor, should be sufficient to guarantee the Special Prosecutor freedom of action. Moreover, as I indicated in my testimony on S. 555 before the Senate Governmental Affairs Committee, such restrictions could be constitutionally justified by the extraordinary circumstances which would justify an initial resort to a Special Prosecutor.

The Department of Justice has no constitutional objection to the bill's method of appointing the Special Prosecutor. However, in view of this bill's departure from the normal methods of appointing Executive officials, I shall briefly state our views as to the constitutionality of those measures. We believe that judicial appointment is justified by the appointments clause, article II, section 2, and the extraordinary circumstances which would mandate recourse to a special prosecutor. It is our view that article II, section 2 cannot be used to override

the fundamental principle of separation of powers; this principle would generally require that the Executive be allowed to appoint those officials carrying out Executive functions. However, the circumstances surrounding misconduct by high-level officials and the need to preserve the appearance as well as the substance of justice would warrant a judicial appointment here. In such exceptional circumstances we do not believe that an "incongruous" duty would be imposed upon the courts. See *Ex parte Siebold*, 100 U.S. 371, 398 (1879).

While the Department supports the basic approach of this bill, we would suggest some modifications in the scope of the bill's coverage. Most importantly, we believe that the bill's scope as to the individuals covered might be narrowed. While conflicts of interest may appear with respect to many of the officials specified in the bill, we would submit that no conflict exists with respect to most individuals serving at level II of the executive schedule. Where prosecution is warranted the Department is willing and fully able to prosecute such persons. Agency Under Secretaries, for example, are not so close to the President that a conflict of interest would inevitably appear where they are prosecuted by the Department. Of course, if a conflict does develop, the Attorney General could always refer a case to the Special Prosecutor under the procedure specified in proposed section 592(e). We believe that a resort to a special prosecutor should be reserved for those extraordinary instances where the appearance of conflicts of interest is substantial.

The bill as presently drafted encompasses only violations of the Federal criminal law relating to the abuse of Federal office, the financing or conduct of elections or election campaigns, obstruction of justice or perjury, or conspiracy to violate any such Federal criminal law or to defraud the United States. In principle, the Department favors this approach of specifying the sorts of crimes which are to be prosecuted by the Special Prosecutor. We believe that this approach recognizes that conflicts of interest, or the appearance thereof, generally arise only in connection with alleged violations of law committed by virtue of an official's position. However, the Department would acknowledge that, at least in light of recent events, conflicts of interest might appear when certain officials—e.g., the President, Vice-President, or the Attorney General—are allegedly involved in any sort of Federal criminal violation. I suggested in my testimony in the Senate that a Special Prosecutor might appropriately be appointed in such circumstances, and I submit that same suggestion here for your consideration.

The Department would also like to offer several brief suggestions regarding other aspects of the bill:

(1) We believe that the time frame for the preliminary investigations should be expanded somewhat. While many investigations can be completed in sixty days, a longer time period—e.g., 90 days with an automatic 30-day extension upon a certification to the court—would allow for a more effective screening of frivolous allegations and would thereby avoid unnecessary referrals to a special prosecutor.

(2) In the interest of allowing for a speedy and confidential resolution of allegations, referral of more than one matter to an existing special prosecutor should be allowed. Proposed section 593(c) could be interpreted to allow for this, but we think this matter should be stated more clearly. In addition, provision might also be made for referral to a United States Attorney if speed or confidentiality become particularly important; the fact that the special court would appoint him should be a sufficient safeguard to ensure his independence.

(3) We recommend that the provision requiring the special prosecutor to "co-operate" with the "oversight jurisdiction" of congressional committees be eliminated. We think that this provision is ambiguous and can only lead to confusion on the part of the special prosecutor; it may even be taken to imply that Congress could exercise control over prosecutorial decisions. If this provision is to remain in the bill, we would strongly suggest that it be written so as to eliminate this implication.

(4) We also recommend that the provision allowing for a discretionary referral by the Attorney General to a special prosecutor, proposed section 592(e), be somewhat delimited. We would suggest, first, that the Attorney General be explicitly allowed to make the same sort of determinations as to the substantiality of allegations as he does under the automatic referral procedure. We would also suggest the insertion of a provision allowing for a disqualification of the Attorney General to eliminate any conflict of interest. Finally, we would recommend that the reference to the interests of the President's political party be

eliminated lest this provision be deemed to apply broadly in cases involving criminal conduct by any member of *either* political party, as prosecution against members of the "other" party might just as well affect the interests of the President's party as prosecution of members within his party.

(5) In addition, we recommend that the Attorney General's determination under proposed section 592(e) be made unreviewable in the courts. Otherwise prosecution could be delayed on the grounds that the Attorney General should have, or should not have, transferred a case to the special prosecutor.

(6) We believe that proposed section 595(e), allowing Congress to request the Attorney General to apply for the appointment of a special prosecutor or to explain his failure to do so, should be eliminated. If the situation is one requiring the automatic appointment of a special prosecutor upon a determination that the allegations were not unsubstantiated, the Attorney General presumably would be in the process of making, or would already have made, a report to the court. If it were appropriate to disclose that information, the court could do so.

The only situation where a report to Congress might be justified would arise in those instances where, under proposed section 592(e), the Attorney General determines that a referral to a special prosecutor is not necessary. In such instances we would not object to a provision requiring the Attorney General to explain why he believed no conflict of interest existed: we do not believe he should be required to explain any aspect of his determination relating to the exercise of prosecutorial discretion.

(7) We recommend that a provision be inserted requiring the special prosecutor to follow standard Department policies and regulations unless some special need requires otherwise. This proposal is necessary to the fair and uniform application of the law.

(8) The provision requiring a notification to Congress of information which may constitute grounds for an impeachment should be amended to provide the discretionary communication of such information to Congress. In view of the ambiguity of what constitutes grounds for impeachment, this provision as presently drafted will only serve to create confusion. Moreover, such mandatory disclosure to Congress might have the effect of compromising an ongoing investigation or prosecution or of prejudicing the rights of the individual involved.

(9) We believe that proposed section 597(a), which requires the Department to suspend all investigation or proceedings within the special prosecutor's jurisdiction, should be modified. Given the haziness of jurisdictional lines, this provision could require the Department to discontinue major proceedings only tangentially related to the matter referred to the special prosecutor. The section should at least provide for an exception whereby the Attorney General and the special prosecutor could agree that the Department could retain jurisdiction over such matters.

I note that the House bill, in contrast to S. 555, includes no provision for the creation of an Office of Government Crimes within the Department of Justice, and I wish to commend this committee for not pursuing this ill-advised course of action. The purpose of such a proposal evidently is to strengthen the enforcement of Federal laws designed to insure the integrity of public officials by centralizing the responsibility for the enforcement of such laws in a single unit of the Justice Department. While the Department shares this laudable goal, we believe that this objective is already being served by the Public Integrity Section within the Criminal Division. This section was formed in March of 1976 and has since displayed its ability to function vigorously and with considerable success. The responsibility for this Section is where it should be, in the head of the Criminal Division. He is the person best suited to marshal the resources of the Criminal Division for the big cases within the jurisdiction of the Public Integrity Section and to make certain that the investigation and prosecution efforts of the whole Division are coordinated to assure the most effective enforcement of our laws against public corruption.

The statutory establishment of an Office of Government Crimes would entail distinct disadvantages. On the one hand, if the Office were located outside the Criminal Division, the effect would be a fragmentation of criminal law enforcement responsibility and a duplication of effort in numerous investigations that overlap with other criminal matters. On the other hand, placing the Office in the Criminal Division would give rise to problems of a different nature, arising from the fact that both the head of the Office and the Assistant Attorney General in charge of the Criminal Division would be Executive level appointees

reporting directly to the Attorney General. This fact would make effective supervision of the Division by the Assistant Attorney General difficult at best, and would jeopardize the ability of the head of the Criminal Division to move resources within the Division in order to most effectively enforce the anti-corruption laws.

In short, the Department strongly believes that the effective and fair investigation and prosecution of crimes of public corruption can be better attained by the existing institutional structure of the Department of Justice. I hope, therefore, that this committee will see fit to adhere to its approach of not mandating an Office of Government Crimes by legislation.

Mr. Chairman, I should like to conclude by expressing my appreciation for the committee's willingness to give close attention to the complex and what many might consider technical arguments I have presented today. However, even though such concepts as the separation of powers may be regarded in some quarters as musty or as an impediment to an efficient Government, the fact remains that our Constitution provides for a very distinctive form of Government. It is not enough to say that a certain proposed solution to an existing problem is sensible or practical; it is also necessary that this solution comport with the framework of Government so carefully crafted by our forefathers and so essential to the continued health of our free society. If there is any doubt as to the view which the Supreme Court might take on this matter, its decision in *Buckley v. Valeo*, *supra*, should make this matter clear. There the Supreme Court struck down portions of a prominent piece of recent legislation, for the reason that it violated the essential scheme upon which our Government is founded. The legislation being discussed today is designed to prevent an abuse of the principle of separation of powers by allowing for a largely independent force to prevent an obstruction of justice, or appearance thereof, by high-level Executive officials. I urge that you pay heed to this same precept in reviewing the portions of the bill I have discussed today.

Mr. MANN. Our next witness is Professor Herbert S. Miller of the Georgetown University Law Center, who will testify on behalf of the American Bar Association.

Professor Miller served as reporter/consultant to the ABA's Special Committee To Study Federal Law Enforcement Agencies, whose report, "Preventing Improper Influence on Federal Law Enforcement Agencies," has been provided to all of us by the ABA.

Professor Miller testified before our subcommittee last year at our hearings on special prosecutor legislation, and we are happy to have him back.

We have your prepared statement, which, without objection, will be made part of the record, and you can proceed as you see fit.

#### **TESTIMONY OF HERBERT S. MILLER, PROFESSOR, GEORGETOWN LAW CENTER, ON BEHALF OF THE AMERICAN BAR ASSOCIATION**

Mr. MILLER. Mr. Chairman, I just want to say that Professor Livingston Hall was originally going to appear and testify last week, and he was here prepared to testify. When the date was changed, it created a conflict for him which he could not resolve and that is why he is not here today.

Mr. MANN. I note his name on the statement.

Mr. MILLER. I will highlight several issues.

The position of the ABA is that the controlling approach to the appointment of a special prosecutor should be the theory of conflict of interest. And under that approach, we believe that the commission—or the alleged commission—of any Federal crime by one of named actors or by somebody else where there might be a conflict, should be covered.

The provision in your bill on crimes involving abuse of power raised in our minds a question of where you draw the line as to what may or may not be an abuse of power. In a given case this might create litigation as to whether it was a crime covered by the statute. Thus we feel that a conflict should be the determining factor in whether or not a special prosecutor is appointed, rather than the crime itself.

As to persons specifically covered in the bill we believe that the approach taken in S. 555, reported out of the Senate Government Affairs Committee, that of including level I positions and naming specific positions thereafter, may be a better approach than including everybody in level II in.

We also believe that the requirement that a preliminary investigation be completed in 60 days may be inadequate in some cases. I served as a prosecutor in the Criminal Division of the Department of Justice and did investigate crimes involving Government corruption. Sixty days could be inadequate; there should be some provision made for a possible extension to 90 or 120 days.

The reviewability issue has two components. First there is the reviewability of the Attorney General's basic decision as to whether or not the case is substantial enough to go forward; and there is possible review of the Attorney General's determination of whether or not there is a conflict.

The special committee rejected, for many reasons set forth in our report, a permanent special prosecutor. And once we rejected this and approved a temporary special prosecutor, we had to determine at what point that temporary special prosecutor should be appointed. And obviously, it's at a point where there is some kind of conflict. If every allegation made about high public officials raised a conflict issue, and you had to appoint a special prosecutor every time such an allegation was made, in our view the effect would be to have a permanent special prosecutor, because the allegations may be made frequently.

To avoid this we fully support the notion that the initial determination whether a case is substantial, which in our view is purely a discretionary decision for the prosecutor should be left to the Attorney General.

We recognize that this may create the problem you mentioned, Mr. Hall. In part we also fully support the Government Crimes Division because we think it relates to this question. Creating a Government Crimes Division means you have a presidentially appointed assistant Attorney General in charge. It means that this person is subject to Senate confirmation. It means that during the appropriation process this person will testify on behalf of the division. As I understand it, the House Judiciary Committee is now in the appropriation process and would therefore have access to what that official was doing, how monies were being spent and how authority was being exercised.

The special committee felt that the problem of the discretionary decision as to whether or not a case is substantial would really be made by the head of the Government Crimes Division. And this individual would be subject to congressional oversight. Admittedly it does not answer the ultimate question as to whether an Attorney Gen-

eral might not proceed with a case on the grounds of it being unsubstantial, thus avoiding investigation of a conflict case.

I don't believe we can answer that, except perhaps by a permanent special prosecutor. We think this raises more problems than it resolves.

We fully support removal of the special prosecutor by the Attorney General under the standard of extraordinary impropriety. We examined the notion that the court be involved in the removal process from the beginning, and rejected it on the grounds that it would require the court to watch what the prosecutor is doing and perhaps get in a posture which would be clearly unconstitutional.

Therefore, we felt it should be the Attorney General's responsibility to remove under a standard. In our view the judicial review of that removal would be limited to whether or not this standard was met. The judiciary would not review how the special prosecutor was performing his job, whether or not he should have prosecuted or should not have prosecuted in a given case—only whether or not the Attorney General met the requirement in removing the special prosecutor. We do not feel this is unconstitutional; we feel the courts have upheld limitations on Presidential removals of individuals who are not purely executive officials.

This is applied to many regulatory agencies; and we do not view the prosecutor as purely an executive official. The courts have held it to be quasi-judicial position, that the prosecutor as an administrator of justice is also an officer of the court, and that his actions are subject to review by the court if he goes beyond the bounds of proper ethics. And, therefore, we feel this review does not contain any constitutional problems.

Section 595(d) relates to congressional oversight. We feel this section could create problems. Once a temporary special prosecutor is appointed we believe he should be independent, subject only to removal for very, very strong grounds of extraordinary impropriety. As we read this provision, it appears that the special prosecutor would be obligated to appear any time the appropriate congressional committee wanted that prosecutor to appear.

It might be in the course of an extremely delicate investigation; and Federal prosecutors, I believe, are bound not to comment on pending investigations or prosecutions. If they were required to come before a congressional committee, it could have implications as to the investigation itself, or institute an invasion of privacy.

That finishes my statements, Mr. Chairman.

Mr. MANN. Thank you very much.

Mr. Hall?

Mr. HALL. Professor Miller, of course, I agree with you on the fact that we should not have a permanent special prosecutor; but my question is, suppose several matters come up and the special prosecutor is appointed, is there not a present danger of that special prosecutor becoming a permanent prosecutor, by virtue of more than one matter being investigated at one time? What is the difference, in your opinion, between a special and a permanent prosecutor?

Mr. MILLER. The delineation of jurisdiction would be made by the appointing authority, in this case, the special division of the court. Under present law, if the Attorney General were to appoint a special prosecutor, the Attorney General would limit the authority.

That delineation of jurisdiction would be a clear limitation. A special prosecutor who went beyond that jurisdictional limitation might be guilty of an extraordinary impropriety and subject to removal.

Mr. HALL. Would the court in your opinion have the authority to limit the jurisdiction of a special prosecutor.

Mr. MILLER. In terms of it being the appointing authority, yes. I think the bill provides that the Attorney General should provide essential information to the division—and I believe the purpose of that information would be to enable the court to determine the jurisdiction.

Mr. HALL. But would the court have the power and authority to limit jurisdiction—investigating a crime?

Mr. MILLER. We believe in this extraordinary circumstance, yes.

Mr. HALL. Do you have any authority to substantiate that position?

Mr. MILLER. We spent a great deal of time examining the question of whether courts could appoint inferior officers, and we do regard the special prosecutor as an inferior officer. It became clear to us that the Constitution contains just such a provision authorizing the appointment of inferior officers by the President, by somebody he designates, or by a court of law.

We examined the history of this provision, the application in a number of Supreme Court cases, and concluded that clearly the court would have the power to appoint a special prosecutor under clearly defined circumstances. Once given that authority, we think the limitation of jurisdiction has to come from the appointing authority, and the limitation of jurisdiction does not go to prosecutorial discretion in a case.

In other words, once the special prosecutor begins investigating that case, the court would have no authority in terms of the exercise of prosecutorial discretion but the initial determination of jurisdiction can be delimited in a number of ways. We do not see a constitutional problem in that initial delimitation.

Mr. HALL. Suppose an instance arose where a special prosecutor had been appointed and the jurisdictional limits had been set out for that investigation, and the prosecutor determined that there was more than the one particular matter in which he had been appointed, which would call for an extension of jurisdictional authority. Is it your understanding that that person would then report back to that court for additional authority to move in that direction?

Mr. MILLER. I think if it was an extension of the jurisdiction, that would be essential. In S. 555, this problem is dealt with by providing that certain related matters—and if the Attorney General consents—might be included within the jurisdiction, because it is entirely possible and may be in some cases probable that the initial jurisdictional limits might have to be expanded.

Mr. HALL. Would be too limited?

Mr. MILLER. Would be too limited. I think the way the bill is written now, it would require going back to the special division.

Mr. HALL. You speak of the Hyde bill or the Mann bill, that you have to go back to expand jurisdiction, or both?

Mr. MILLER. I think it's the Mann bill, but I'm not sure. I don't know that the question is specifically addressed. I'm just assuming—

that the appointing authority sets the jurisdiction, and that if it is substantially expanded, it would require it go back to the appointing authority.

Mr. HALL. That's all. Thank you.

Mr. MANN. All right, thank you.

Mr. Wiggins?

Mr. WIGGINS. Professor, you have indicated that if the Attorney General makes an initial determination not to seek the appointment of a special prosecutor, that such determination should itself be subject to review by the panel.

Mr. MILLER. If he's gotten beyond the preliminary investigation, Mr. Wiggins, and has determined that it may require more investigation, at that point the conflict question becomes serious, and if he determines that it may require it, he has the option of either not appointing one or applying, we believe.

Mr. WIGGINS. Not to appoint, is that decision subject to review?

Mr. MILLER. We believe it should be subject to review.

Mr. WIGGINS. By whom?

Mr. MILLER. By the special division of the court.

Mr. WIGGINS. On his own motion? Does anybody have standing to walk in and seek such a—

Mr. MILLER. I believe the Attorney General would be required—or should be required—if it gets beyond preliminary investigation. If the Attorney General finds there is no substantial case, this need never go to the special division. It's only if there is a case, a substantial case, that the conflict question arises. And if the Attorney General decides that it does not require the appointment, that decision and the reasons therefore should go to the special division. In other words, the Attorney General should be required by law to forward a memorandum explaining that the question of conflict under the standards and the statute was examined and a determination made that there was no need for the appointment of a special prosecutor. The court could then review that decision.

This would not go to whether the case is weak or strong, but only to the conflict question.

Mr. WIGGINS. The court, then, would be asked to make an independent judgment of the propriety of the Attorney General's electing not to proceed?

Mr. MILLER. That is correct, sir.

Mr. WIGGINS. That is a judicial function? What part of a case in controversy is that?

Mr. MILLER. There must be, in our view, an outside interest or an outside entity capable of making a judgment as to whether or not there is a conflict. Nobody presumes that the Attorney General is incapable of making that determination. However, I think our Founding Fathers recognized that people in power are not angels. It was James Madison who said, "If men were angels, we would not need governments." He concluded—in one of the Federalist Papers in support of the Constitution, I think—that our Founding Fathers recognized very clearly that people in power can become corrupt. We believe the checks and balance system was deliberately put in because of this recognition. What Mr. Madison said was that because of the fact that men are not angels, we have to set up auxiliary measures to make certain that they

do act properly. We use this approach as our benchmark in approaching this problem. Thus, somebody on the issue of conflict besides the Attorney General has to look at it to determine if there is a possible conflict. The review of that issue did not, in our view, constitute a constitutional question.

Mr. WIGGINS. I respect your judgment—your conclusionary views—but help me understand whether or not a judge or panel of judges called upon to decide the question as to whether or not the Attorney General properly refused to go forward, whether or not those judges—all article III judges—are executing article III powers or not.

Mr. MILLER. What we are asking—

Mr. WIGGINS. And reference to constitutional theory and history really doesn't deal with whether it's an article III question.

Mr. MILLER. I would put the question differently, Mr. Wiggins. I would say we are asking them to decide whether or not a special prosecutor should be appointed. If we agree that they have the constitutional authority to make an appointment of such an inferior officer, all we are asking is whether one should be appointed in this case. They are the appointing authority. And I would approach it from that point of view.

Given that authority, then the decision as to whether or not to appoint a special prosecutor must ultimately reside with the appointing authority.

Mr. WIGGINS. I don't know what the essential elements of a case or controversy are, but I think that it involves an adversary relationship, and here you've got the Government arguing with itself. You don't have a plaintiff and a defendant and a magistrate standing between them attempting to arbitrate according to the law that controversy. You merely have the executive department making a preliminary judgment and the judicial department finally deciding whether the objective is right or not.

Is that the kind of adversary relationship you would expect in an article III controversy?

Mr. MILLER. Again, I must respectfully phrase the issue a little differently, Mr. Wiggins.

The appointing authority in a court of law that is put in the posture of appointing officials under the Constitution is not acting as a court of law in a case in controversy.

Mr. WIGGINS. It's administrative.

Mr. MILLER. I don't think a case or controversy analogy applies here, because they are acting under a different constitutional provision.

Mr. WIGGINS. Well, I agree. But if I were to analogize whether this was—whether this resembled more an administrative function, conducted by the court, like the appointment of a bailiff or an adjudicative function in which a controversy is resolved, I think I would tend to lean over on the controversy side, except that it lacks all the elements of controversy, but it has none of the elements of an internal court administrative function.

Perhaps your committee thought it did. This, I think, is to be distinguished from the authority found in the statute for judges to appoint a temporary prosecutor in the absence of a U.S. attorney. But it's to be borne in mind that that is an action taken wholly until the

Executive acts, and the Executive cannot do it—fire him—immediately without question. You don't second-guess the judge's judgment and replace him. That's more of an administrative act, and overturning the decision of the executive branch.

Well, I'll tell you, I don't have a formal opinion with respect to the constitutionality of the appointing process by a judge, but if your committee, especially with yourself as a member of it, reviews it, I would like to have the benefit of your research and analysis so that I can make up my own mind as to whether it does or does not affect the separation of powers notion that I may have, and my concern to the extent—not only to the appointing process but to the removal, as well. And you seem to suggest that in both cases there is a role for the courts to play.

Mr. MILLER. Yes.

Mr. WIGGINS. And that's the nub of my concern. If you will share your research with me, I would appreciate it.

Mr. MILLER. I did prepare a memorandum at the last hearing, because many of these issues had been raised. It attempts to address some of these problems.

Mr. WIGGINS. Well, probably my memory is not what it should be.

Mr. MILLER. I only remember it because I prepared it.

Mr. WIGGINS. Such a memorandum is in our files, and I have just marked it and shall read it.

Whether I agree with it or not, we'll see.

Well, Professor, I think any other questions that I ask are almost matters of detail that do not probably go to the same depth as this matter of judicial involvement in the appointment of the officer heretofore regarded as an executive officer, and I think that your statement will be more useful to read than any questions I might have.

Thank you very much.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. Dr. Miller, I am interested in four or five hypotheses. One of them is this:

Suppose that we see a special prosecutor appointed to investigate into conduct of a Vice President, say, and then that individual resigns. Does this bill cover it?

I don't think it does. I scanned it, and I don't find any provision within it.

What would be the result at that point?

Would the apparent conflict then be removed and the Department of Justice then be in a position to proceed, since the office would then be vacant and the individual be nothing more than a private citizen?

Would the District Attorney of the district in which the crime had been allegedly committed receive from the special prosecutor his files and information; and would the special prosecutor's services then terminate? Is that your interpretation?

Mr. MILLER. You could read this two ways—the name and the office. Clearly it has to be a crime committed while the person is in office. If a special prosecutor is appointed and the individual resigns, you could read it to cover a continuation of that prosecution because the crime was allegedly committed while the person was in office.

You could also read it as meaning the person has to hold the office during the investigation. It's not clear.

I would probably tend to say that once the investigation started, and it was an act committed while in office, the person under investigation would continue to be covered by the special prosecutor.

I'm not certain.

It may be that you would want the language to specify that.

Mr. GUDGER. What is your sense as to what the act should provide?

Would it be reasonable at that time to have the special prosecutor deliver his information to the responsible District Attorney and conclude his activity; or should he continue on, now that this person is no longer in the governmental position, and the situation which triggered his appointment is no longer applicable?

Mr. MILLER. You create a number of problems if you just terminate one investigation and turn over the files to another prosecutor.

It's not only the files which are important, but a lot of intangible knowledge and feel for the case which any prosecutor gains would be lost. If we are talking about individuals covered in the bill, the criteria should be that once the investigation begins, regardless of their subsequent status, it should continue with the special prosecutor.

Mr. GUDGER. So your feeling is that if the special prosecutor has gathered sufficient evidence to warrant submission of indictment and further prosecution, then he should continue until the case is closed?

Mr. MILLER. I would go further. If he was in the middle of an investigation and had not yet determined to go to the grand jury, he should still continue it. And if a case was to be dismissed, the special prosecutor should make that decision.

The appearance of conflict as the problems of partiality and impropriety might still exist, even though the person had resigned that office.

Mr. GUDGER. And if the act is silent on that proposition, would you not feel we would be acting amiss in not making a provision that clearly demonstrated that he would continue to function?

Mr. MILLER. Yes, sir.

Mr. GUDGER. Now, another concern is this concern about the prosecutorial jurisdiction, that is, the term used on page 6 of H.R. 2835 where it is specified that the court shall appoint—a division of the court shall appoint—a special prosecutor and shall define the special prosecutorial jurisdiction.

Now, there is other language in here intimating that the Attorney General may from time to time turn over matters to the special prosecutor which are within the jurisdictional authority which has been defined—I presume, by the appointment and by the division of the court. Now my concern is this: Do you see that this act needs to make it possible for the special prosecutor to come back to the division of the court for a redefinition or extension of his jurisdiction when he gets into an investigation and finds that that is indicated?

In part, this is addressed on page 7, which says the division of the court, upon request of the Attorney General, may expand the prosecutorial jurisdiction of any existing special prosecutor.

Mr. MILLER. That would require him to go to the Attorney General initially and have the Attorney General go to the court. This accomplishes the same purpose of not permitting the special prosecutor, without some control, to expand his jurisdiction beyond that authorized.

Mr. GUDGER. Even if he's getting into a situation which may involve the Attorney General?

Mr. MILLER. Which did not appear at first blush?

Mr. GUDGER. That's what I'm talking about. He gets into an investigation, and the investigation leads to——

Mr. MILLER. I see nothing in the bill which would prohibit the Special Prosecutor from going back to the division of the court and asking for an extension. I think it would be implied.

Mr. GUDGER. I think it might be good to clear it up, if the bill is silent in that aspect. If you don't see anything wrong with the Special Prosecutor, if he's qualified to render this service, if he meets the criteria, if his jurisdiction is defined, and if his investigation does indicate that he needs to extend beyond that jurisdiction as defined, do you see anything wrong in him coming back to the division of the court for that purpose?

Mr. MILLER. The bill requires initially that the Attorney General provide information to the court which would help the court define jurisdiction, and which the court might well need. I would not prohibit the Special Prosecutor from going back to the division, but I would want to bring the Attorney General into the process.

Mr. GUDGER. Two other questions, and, Mr. Chairman, I will try to conclude.

I see here that on page 7, subdivision (d), the division of the court may not appoint as a Special Prosecutor any person who holds any office of profit or trust under the United States.

Do I understand that to mean that the division of the court must go beyond all present officeholders, even though it might be considering appointing someone who is a District Attorney in another State of a different political party, serving in a division within another State, to come in and take over this responsibility?

Would that individual—would he be disqualified by virtue of that office from being considered for appointment; or does it mean that he could resign that office and assume this duty?

You see, the language is——

Mr. MILLER. I see the language. I think you are correct. It could be that a resignation might make a person eligible. The committee might want to consider language which would make the key date whether or not the person was holding office at the time this matter was first broached to the special court to prevent a quick resignation and thus consequent eligibility. I think you are right, Mr. Gudger. It is not clear.

Mr. GUDGER. Thank you.

One final problem. On page 12 of the House bill H.R. 2835, the provision is set up whereby the Members—either majority or minority—majority of either majority or minority party members of the Judiciary Committee of either House may request that the Attorney General apply for appointment of a Special Prosecutor.

And then under this machinery that's provided here, the Attorney General must give an accounting back to the committee within 30 days.

Is it the thought of this draft that the committee would then be able to pass such necessary legislation as it might deem appropriate in the event the Attorney General had not satisfied the committee with respect to its recommendation?

I'm trying to comprehend how we have this business of the committee asking for a report and getting a report and then everything stops.

Can you explain why this is in here?

Mr. MILLER. I'm not sure I can, Mr. Gudger. I was not privy to the drafting of that provision. At one time some of us were discussing a provision whereby any citizen could be able to go to the special court and request the appointment of a Special Prosecutor. We discarded that, because there were too many problems in such an approach. I'm not sure why the provision is in there, except I assume it came from the Watergate kind of situation, where you had no mechanism, where everything was being done at first instance.

Mr. GUDGER. I notice here that it's suggested in this draft that the committee may, after it receives such report, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification that will not in the committee's judgment prejudice the rights of any individual.

I just wondered if this particular machinery, which is certainly new, to my legislative experience, has any precedent anywhere. I find it a procedure that is somewhat novel, that a certain group of a committee which may be less than a majority of the committee and may not involve the chairman of the committee, call for a report, and that report comes in, and the act is suggesting that public disclosure might ensue under certain circumstances, either at the request of the Attorney General or in the sense of the committee.

It's just a little unusual, and I just wondered if you had any knowledge of its existence.

Mr. MILLER. No, sir.

Mr. GUDGER. Thank you.

Mr. MANN. Mr. Hyde?

Mr. HYDE. I have no questions, thank you.

Mr. MANN. Counsel, do you have any questions?

Mr. HUTCHISON. No.

Mr. SMETANKA. No.

Mr. MANN. Professor Miller, thank you very much for your assistance.

[The prepared statement of Herbert S. Miller follows:]

STATEMENT OF LIVINGSTON HALL AND HERBERT S. MILLER, ON BEHALF OF THE  
AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the Subcommittee, I am Livingston Hall, Professor Emeritus of Harvard Law School and chairman of the ABA Special Committee to Study Federal Law Enforcement Agencies. It is a privilege to appear before you today on behalf of the Association to share with you our views on the important subject your committee is addressing—the prevention of partisan and other improper influences from intruding upon and disrupting the functioning of agencies and departments of the federal government.

The Association, as the principal representative of and spokesman for the legal profession in this country, is particularly concerned about such improper influences being exerted upon federal law enforcement agencies and activities, and my comments today will be addressed primarily to those matters. The Association's interest in the subject of the proper administration of justice dates back, of course, to the Association's inception in 1878. The views expressed today, however, were formulated over the last four years by the Special Committee to Study Federal Law Enforcement Agencies, which was created in 1973 to examine

the functioning of those agencies and to formulate recommendations to insure they would not be improperly politicized or misused. While the creation of the Special Committee was occasioned by the series of events generally called Watergate, the Association and the Special Committee were fully aware that the problems being addressed were not peculiar to a particular administration but have been of concern for many years.

I have been privileged to serve as chairman of the Special Committee for the past year. My predecessor as chairman of the Committee, which produced a report, "Preventing Improper Influence on Federal Law Enforcement Agencies" in 1976, was William B. Spann, Jr., now President-Elect of the Association. The twenty recommendations contained in this report, a copy of which has been made available to the members of your Subcommittee, were adopted in their entirety by the American Bar Association's House of Delegates in February, 1976.

Appearing with me is Professor Herbert S. Miller, Co-Director of the Institute of Criminal Law and Procedure, Georgetown University Law Center, and a member of the Special Committee. Professor Miller acted as consultant to the Committee in the production of the report and recommendations.

The Subcommittee may be interested to know that, with today's appearance, representatives of the American Bar Association have testified before committees and subcommittees of Congress six times within the last year on the subject of improper influences. Prior appearances on the subject of special prosecutor legislation were made before this Subcommittee, and the Senate Committees on the Judiciary, and Government Affairs, and an appearance was made before the House Judiciary Subcommittee on Civil Liberties last year on the subject of FBI oversight. I mention these appearances because I think they provide strong evidence of the ABA's belief in the importance of congressional action in this field.

In formulating its recommendations, the Special Committee began by rejecting the notion that problems of improper influence and corruption are solely attributable to a few bad individuals and that the prevention, therefore, is to ensure that only the good occupy positions of power. Such a "bad apple" theory does not bear up well when viewed in the historical context of the last several decades.

Our report documents a long and unfortunate history of the progressive politicization of the Department of Justice and the growing misuse of the FBI and the Internal Revenue Service and subsequent abuses of power by these organizations. Beginning in 1936, the FBI was asked by President Roosevelt to look into "subversive activity in the United States" and obtain "a broad picture of the general movement." Further memoranda from President Roosevelt and succeeding Presidents brought the FBI into the domestic intelligence function and ultimately into highly questionable areas involving the civil and political rights of United States citizens. All but three Presidents since Roosevelt have appointed as Attorney General an individual who played a partisan role in that President's election campaign. Further, beginning in 1961, the Internal Revenue Service, under pressure from the White House and some committees of Congress, has engaged from time to time in politically-oriented intelligence activities unrelated to the administration of the Internal Revenue laws.

The ABA believes that basic institutional and structural reform is essential to assure the public of the integrity of our federal law enforcement agencies. The ABA agrees with the statement made by James Madison in the 51st Federalist Paper:

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity for auxiliary precautions."

I mention this consideration because we now have a new administration and an Attorney General held in the highest repute in the legal profession and by the American Bar Association. Nothing in the ABA recommendations is directed at a specific Administration or a specific Attorney General. Neither the current Attorney General nor top officials in the Department of Justice had any connection, of course, with the event known as Watergate. More importantly, both the President and the Attorney General have on previous occasions expressed strong support for legislation approaching problems of structural reform in the manner contained in this legislation. As the committee knows, the prior

Administration took major steps forward in promulgating rules relating to the FBI, the establishment of a special section in the Criminal Division to investigate government crimes, and the creation of an Office of Professional Responsibility to make internal investigation of alleged wrongdoing within the Department.

The Committee's recommendations will serve to preserve these measures against change under future administrations. We do not know what the future holds, but there is ample historical evidence that men are not angels and "auxiliary precautions" must be taken to prevent future officials from being tempted to abuse their power. I have spent some time on this point because it is fundamental to any discussion of how to prevent improper influences on our federal system of justice. The ABA believes the measures recommended in its report will go a long way towards preventing future abuses and illuminating more quickly those which may occur despite such reforms.

There are other fundamental concepts underlying the specific recommendations of the ABA. Perhaps the most important relates to Congress. As the body which enacts the laws which must be enforced by the Executive Branch, which confirms appointments to major executive positions, and which appropriates funds for the implementation of the laws it has enacted, Congress has the constitutional obligation to participate with the President in basic policy-making and the setting of priorities. Seventeen of our twenty recommendations focus on the role of Congress in legislating, confirming appointments, or appropriating monies for federal law enforcement agencies. The primary role that Congress must play in establishing basic policies in this area cannot be overemphasized.

There are other basic themes which underlie the recommendations. The ABA believes that responsibility for federal law enforcement activities must be focused in the Department of Justice. Our recommendations, if implemented, would require the Attorney General, subject to legislative guidance by Congress, to exercise internal oversight over the law enforcement functions of the Department of Justice, promulgate rules and regulations to guide FBI operations, supervise a new Government Crimes Division within the Department, adhere to legislatively-set standards in deciding whether or not to appoint or recommend the appointment of a temporary special prosecutor, and set law enforcement resource allocations for presentation to Congress.

The ABA believes the Department of Justice must have the primary role in prosecuting crimes involving official corruption. But the ABA also believes that in certain very limited circumstances additional safeguards are required. We are speaking here of the investigation and prosecution of crimes in which law enforcement officials may find themselves in a conflict of interest, or simply the appearance of a conflict. Such a situation could prevent individuals of even the highest integrity from performing their duties without compromise and without raising fears in the public mind about the integrity of the investigation or prosecution. The Supreme Court has properly noted that "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."<sup>1</sup>

Former special prosecutor Archibald Cox, in testimony before a Senate Judiciary subcommittee in 1975, emphasized that a servant cannot investigate his master, and called for legislation providing a mechanism for triggering creation of a temporary special prosecutor's office at an appropriate time. He said the following about the investigation and prosecution of crimes which might involve the White House:

"The pressure, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential. The question is what, if anything, should be done."

The ABA believes the answer lies in the creation of a triggering mechanism which would take effect under certain circumstances and in accordance with carefully prescribed standards.

Finally, many of the recommendations of the ABA emphasize the concept of accountability. We have attempted to provide in our recommendations specific measures to assure the accountability of various actors in the criminal justice system to their superiors, to Congress, and to the public. The recommendations

<sup>1</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

also emphasize, in our view, the accountability of Congress to the American people through its policy-setting and oversight role.

I would now like to discuss certain provisions of H.R. 2835, the bill your Subcommittee is considering today, in light of our ABA recommendations. Attached to my testimony as Exhibit A are copies of our recommendations on a special prosecutor and on the prosecution of government crimes within the Department of Justice. As you will note, there are great similarities between H.R. 2835 and the procedures we have recommended, and we support the basic thrust of H.R. 2835. There are, however, areas of difference which should be noted.

Proposed section 591 of Title 28 of the United States Code lists specific individuals whose alleged violation of certain Federal criminal laws would trigger the special prosecutor appointment mechanism. We prefer the approach taken in S. 555, the bill introduced by Senator Ribicoff and others in the Senate. In that bill the same individuals are specified, but triggering occurs where there are violations of any federal criminal law. We believe the terms in H.R. 2835, "abuse of federal office," election laws, "laws relating to the obstruction of justice or perjury," or laws where the named individuals conspire "to violate any such federal criminal law or defraud the United States," are too limiting. The fundamental issue is the conflict of interest situation which arises out of the relationship between the various federal officials, not only that created by violations involving the few specific criminal actions specified in H.R. 2835.

The persons covered under section 591 include individuals serving in positions listed in sections 5312 and 5313 of Title 5 of the United States Code. Not included, therefore, are individuals serving in positions listed in Section 5314, that is, persons occupying Executive Schedule level III positions. Included in this category are numerous Under Secretaries, chairmen of a variety of commissions, the Commissioner of Internal Revenue, the Deputy Director of the C.I.A., the Administrator of the Law Enforcement Assistance Administration, and many other administrators and deputy directors of a variety of government agencies. Your Subcommittee may want to review some of these positions to determine if they are at a level high enough to warrant inclusion in section 591. We also note that Congressman Hyde's bill, H.R. 4835, would limit the number of covered Executive Schedule personnel even further by not including level II personnel. We favor the broader coverage of the Mann bill. Finally, we see no reason to extend the coverage to members of Congress, as the Hyde bill would do, since the conflict-of-interest problems necessitating the appointment of a special prosecutor should not arise where the alleged violation is in an entirely separate branch of government.

Section 592 of H.R. 2835 sets forth the standards and procedures by which a temporary special prosecutor may be appointed should the Attorney General find, after an initial 60-day investigation, that the matter warrants further investigation or prosecution. If the Attorney General so finds, a memorandum from the Attorney General to a special division of the United States Court of Appeals for the District of Columbia would then make application for the appointment of a special prosecutor. The American Bar Association, in adopting the recommendation of the Special Committee to study Federal Law Enforcement Agencies, has endorsed this approach. The Special Committee was established at a time when the ability of the Watergate special prosecutor's office to perform its functions fully and without political interference was of great public concern. At the time of the firing of the first special prosecutor, Archibald Cox, then ABA President Chesterfield Smith stated:

"It clearly was and is improper for an investigation of the Executive Branch of the government [to be conducted] by a prosecutor who is under the control or direction of either the president himself or some other person who himself is under the direction and control of the President."

This view is based on standards adopted by the American Bar Association in 1971 in its Project on Standards for Criminal Justice. In the Standards Relating to the Prosecution Function and the Defense Function, the ABA addressed the problem of conflicts of interest in § 1.2 as follows:

"A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct."

The Standards emphasize that it is of the utmost importance that a prosecutor avoid participation in a case in circumstances where any implication of par-

tiality may cast a shadow over the integrity of his office. Finally, Canon 9 of the American Bar Association Code of Professional Responsibility provides that "a lawyer should avoid even the appearance of professional impropriety."

The final report of the Senate Select Committee on Presidential Campaign Activities emphasized the preventive role of a permanent office of public attorney, stating that its existence might have deterred some of the wrongful acts which comprised Watergate. The report concluded that it would be unwise to wait until another national crisis to reconstitute an office of special prosecutor:

"It is far better to create a permanent institution now than to consider its wisdom a some future time when emotions may be high and unknown political factors are at play."

Although the ABA agrees with the concept underlying the Select Committee's recommendation, it opposes the establishment of a permanent office of special prosecutor. It is striking that the calls for the establishment of a permanent office of special prosecutor, once heard so loudly, have now become almost completely muted. Few individuals who have examined the problem from a legal and policy point of view now conclude that such a permanent office is the answer. The many issues which the establishment of such an office would raise have been adequately discussed before many congressional committees and are detailed in our report. I will not repeat them here.

But the ABA has also rejected the notion that the ad hoc approach taken in Watergate provides an adequate answer for the future. It is true that under present law the Attorney General can appoint a special prosecutor. It is true that under severe pressure from the public and Congress, such a special prosecutor was appointed for the Watergate investigation. But the appointment was made only after a crisis of grave constitutional proportions had developed. The basic thrust of the ABA recommendation is that procedures should be established now, which would permit the appointment of a special prosecutor under such circumstances and in accordance with such defined standards as the public, through its elected representatives, shall have determined. Thus, the Special Committee spent much of its time searching for a triggering mechanism which would serve this purpose.

We have not been alone in this quest. All the former special prosecutors have indicated their opposition to a permanent office of special prosecutor but have also indicated that some kind of triggering mechanism would be desirable.

Thus, the ABA Special Committee searched for answers to a variety of difficult questions. What should these objective standards be? Who should appoint a temporary special prosecutor? And who should remove? To whom would such a special prosecutor be accountable?

The Special Committee concluded that standards relating to conflicts of interest would provide the best guidelines for the appointment of a temporary special prosecutor. In line with the ABA's belief that the Attorney General is and should remain the responsible official, the primary obligation for making appointments under such a standard was placed in the office of the Attorney General.

It is the position of the American Bar Association that a temporary special prosecutor mechanism should be triggered only in those cases involving high officials or where a conflict of interest at the highest level would be involved. Proposed Section 592(e) implements this concept by requiring the Attorney General to apply to the special division of the Circuit Court for the appointment of a special prosecutor if, in the course of any federal criminal investigation, the Attorney General determines that the investigation or prosecution "may so directly and substantially affect the political or personal interests of the President or the Attorney General or the interests of the President's political party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such investigation. . . ." This language significantly narrows the traditional conflict of interest standard by requiring that there be a direct and substantial affect. This narrow standard is an assurance that the invocation of the appointing process for a temporary special prosecutor would occur only in those extraordinary instances which truly warrant it.

The ABA recommendation and H.R. 2835 differ to some extent as to how a special prosecutor may be appointed. Under the ABA recommendation, the Attorney General would have initial responsibility to appoint the special prosecutor. The Attorney General would supply the special division of the court with a memorandum containing a statement of facts, legal conclusions and a deci-

sion as to whether or not a special prosecutor was required. The Attorney General could then either appoint the special prosecutor, find that an appointment was not required, or request the court to make an appointment. Section 592 of H.R. 2835 would require the Attorney General, after conducting the initial 60-day investigation, to apply to the division of the court for the appointment of a special prosecutor if he finds the matter warrants further investigation or prosecution.

The ABA view is that, as the chief law enforcement officer in the federal government, the Attorney General should retain authority for the prosecution for all crimes and only in the most extraordinary cases should a temporary special prosecutor be appointed. We believe that H.R. 2835 does not depart excessively from this basic approach in that the circumstances and procedures for the appointment of special prosecutors are clearly limited and defined. What should be stressed is that under both proposals the Attorney General plays the primary role. The Attorney General must review the facts and determine if further investigation is warranted as to alleged violations by the specified high government officials, and he must review the facts with respect to the direct and substantial affect on the political or personal interests of the Attorney General or the President in order to determine whether a special prosecutor is needed in investigations involving other government officials.

There are several provisions of Section 592 which the Special Committee believes deserve some further comment. The Attorney General is given 60 days to conduct a preliminary investigation before making a decision as to whether or not the information is so unsubstantiated as to warrant no further investigation or requires further investigation and possible prosecution, thus triggering a request for the appointment of a temporary special prosecutor. The committee believes that in some cases the investigation may require complex and lengthy investigation by the FBI including the examination of voluminous documents, the assessment of innumerable logs, and many interviews. Such a preliminary investigation might well take more than 60 days. The special committee therefore respectfully suggests that this committee consider extending this period to either 90 or 120 days. In the alternative, the committee may want to include a provision which would authorize the Attorney General to request extension of the 60-day period for an additional 30 or 60 days upon submission of a memorandum explaining the need for such an extension. This memorandum would be part of the notification required under Section 592 to the special division of the Circuit Court after the Attorney General has completed his preliminary investigation.

We are also concerned about the language of paragraph (e) of Section 592, whereby the Attorney General may determine that a continuation of an investigation by him would so directly and substantially affect the interests of the President's political party "as to make it appropriate in the interest of the administration of justice for the Department of Justice to conduct such investigations. . . ." The Committee believes this language is vague and subject to wide variation in interpretation. Language contained in the report of the Special Committee, and adopted by the American Bar Association, might be considered: ". . . as to affect the impartiality and propriety of the Department of Justice continuing to conduct such investigation. . . ." This language has the advantage of being founded in provisions of the ABA Code of Professional Responsibility, with respect to which there is a substantial body of interpretive authority.

Paragraph (e) is silent as to whether or not the determination of the Attorney General as to a conflict is reviewable by the division of the court authorized to appoint a special prosecutor. Our position is that where conflict exists under the circumstances set forth in paragraph (e) self-recusal by the Attorney General may not be sufficient. A decision not to recuse, we believe, should be subject to review by the division. If there are doubts about the appointment of a special prosecutor in a given case, public confidence would be enhanced by such an independent review. But we believe that the initial determination of whether there is a conflict situation substantial enough to warrant serious consideration should be made by the Attorney General. If any preliminary allegations of conflict are determined to be frivolous, such determination should not be subject to review. If allegations appear serious, the Attorney General could further examine the matter. He could then apply for appointment of a special prosecutor or give reasons why no such appointment is required. The division could then make an appointment if its review indicated the need.

We note that Section 594 of H.R. 2835 provides full authority for a special prosecutor to carry out all functions and powers necessary to investigate and prosecute cases where appointed. This is completely in accord with the recommendation of the Special Committee that a temporary special prosecutor have the same powers as the Attorney General or a U.S. Attorney in prosecuting a case.

We note also that the division of the Circuit Court, in appointing a temporary special prosecutor, must define the special prosecutor's jurisdiction. Again we find this to be in complete accord with the recommendation of the Special Committee that the appointing authority delineate the jurisdiction.

Section 596 of H.R. 2835 provides that the special prosecutor may be removed only by the division of the court for extraordinary improprieties, incapacitation, or other conditions substantially impairing the special prosecutor's performance. The ABA Special Committee considered the removal question at great length. We concluded that removal by the court would require the court to conduct some supervision over the special prosecutor and possibly review prosecutorial decisions. This kind of supervision, we believe, could approach the situation where the federal judiciary is supervising the exercise of prosecutorial discretion, a circumstance we believe to be violative of the separation of powers principle and the recognized right of a federal prosecutor to make discretionary decisions not subject to review by other branches of our federal government. For this reason the ABA has recommended that the Attorney General be authorized to remove the special prosecutor for extraordinary improprieties. To make certain that such removal is in accordance with this standard, we believe the removal should be subject to review by the division. In this way the special prosecutor can be held accountable to the Attorney General without fear that the essential independence of the special prosecutor will be breached. We commend to you the procedure contained in Section 596 of S. 555.

Section 595 of H.R. 2835 contains provisions relating to the reporting by the special prosecutor to Congress and to the division of the court. Paragraph (d) of section 595 also authorizes an appropriate committee of Congress to have oversight jurisdiction with respect to the official conduct of a special prosecutor appointed under this chapter and requires the special prosecutor to cooperate with the exercise of such oversight jurisdiction. We question the feasibility of this provision. Once this legislation passes, Congress, except in the extraordinary circumstances set forth in paragraph (e) of Section 595, would have nothing to do with the appointment of a special prosecutor. In no circumstances would Congress be involved in the removal of such special prosecutor, the review of such removal, or the termination of this office and duties.

H.R. 2835 contains comprehensive provisions relating to the standards authorizing the appointment of a special prosecutor, spells out in detail the triggering mechanisms, and describes in detail the roles to be played by the Attorney General, the special division of the Circuit Court, and a special prosecutor once appointed. Once appointed, the special prosecutor should have the necessary independence to conduct a thorough and impartial investigation. During the pendency of such an investigation or prosecution, a special prosecutor, and indeed any federal prosecuting attorney, should not be required to comment on the development of the case, the chances for completing the investigation and prosecution, or what charging decisions might be or might not be involved after a review of all the available information. These are matters which must be left with the discretion of the prosecutor.

Section 595(d) would appear to authorize Congress to exercise its oversight during an investigation or prosecution and require the special prosecutor to answer questions of a potentially sensitive nature which could affect the success of the investigation and prosecution and possibly invade the privacy of individuals under investigation. It is our understanding that the Department of Justice has a rule prohibiting federal prosecutors from commenting on any case under investigation, before a grand jury, or in the courts. We believe this is a proper rule and that it should apply to the special prosecutor as well.

We distinguish the situation and circumstances which may arise under this legislation from the extraordinary circumstances present during the appointment and firing of Archibald Cox and the subsequent appointment of Leon Jaworski as temporary special prosecutor. Unusual arrangements and commitments had been made during the process of confirming Elliott Richardson as Attorney General. A condition of this confirmation was the appointment of an independent special prosecutor. A condition of Leon Jaworski's appointment was that he be given the freedom to pursue whatever actions were deemed necessary

in the investigation and prosecution of Watergate-related cases. Provision was made for Mr. Jaworski to report to the Senate Judiciary Committee concerning problems of cooperation with the Executive Branch of the government at that time. This was appropriate under those circumstances. We do not believe it is appropriate to institutionalize such provisions in a bill setting forth with particularity, and in substantial detail, the nature of the circumstances for appointing a special prosecutor, and specific removal provisions.

The ABA has recommended the establishment of a division of government crimes in the Department of Justice, a provision not contained in H.R. 2835. In general such a division would have jurisdiction over government officials not specifically covered by Sections 591 and 592. We believe its establishment is consistent with the idea that the Attorney General has the primary responsibility for law enforcement and that Congress has the responsibility to set basic policies and oversee the Department of Justice. Former special prosecutor Henry Ruth has stated that such a statutorily-mandated office would at least ensure an allocation of resources to the corruption problem. Through its confirmation and appropriation process, Congress could ensure that the personnel and resources devoted to this area would be sufficient in quality and quantity to fulfill the office's mandate.

The ABA believes that such an office is vitally needed. There is a history of inadequate monitoring of conflict of interest laws and of not prosecuting election law violations. We believe the recent establishment of a Public Integrity Section in the Criminal Division by the former administration is a progressive first step towards rectifying a situation which has existed far too long. However, the ABA also believes that this approach to prosecuting government crimes should be perpetuated by legislation. The present administration and Attorney General may be committed to the impartial prosecution of such crimes. But what assurance do we have that successors in office will be similarly committed? With such a statute, and with Congress playing its proper confirmation and oversight role, there will be much greater certainty that such crimes will be vigorously prosecuted.

#### EXHIBIT A

#### RECOMMENDATIONS ADOPTED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES, FEBRUARY, 1976

##### *Special Prosecutor*

The establishment of a permanent office of special prosecutor is opposed. Congress should enact legislation authorizing the appointment of a temporary special prosecutor by the Attorney General or by a special Court of Appointment under carefully defined circumstances and standards. The special Court should consist of three retired senior federal circuit court judges appointed by the Chief Justice for a two year term.

The temporary special prosecutor would, under such legislation, be appointed and removed in the following manner:

1. The Attorney General would be required to inform the Court of Appointment of action taken in any matter where appointment of a temporary special prosecutor was considered by the Attorney General in accordance with the standards. A memorandum to the Court would include a statement of facts, legal conclusions, and the decision. The Attorney General could either appoint the special prosecutor, find that an appointment was not required, or request the Court to make an appointment. After a review of the memorandum the Court could take whatever action it deemed necessary, including the appointment of a different individual as temporary special prosecutor if in the Court's view the individual appointed by the Attorney General does not meet the standards. In such instances the special prosecutor appointed by the Court would supersede the one appointed by the Attorney General.

2. The Court could act on its own authority when in its judgment the standards require appointment of a temporary special prosecutor.

3. When the Attorney General appoints a temporary special prosecutor the memorandum to the Court would delineate the jurisdiction of the special prosecutor. This statement of jurisdiction would be reviewed by the Court and modified where necessary. When the Court makes the appointment it would delineate the jurisdiction.

4. The temporary special prosecutor should be subject to removal by the Attorney General for cause. A statutory guideline of "extraordinary improprieties"

or a similar standard should be provided for removal decisions. This decision should be subject to immediate review by the Court.

A temporary special prosecutor appointed by the Attorney General or by the Court should have the same powers as the Attorney General or a U.S. Attorney in prosecuting a case.

Circumstances and standards to guide the appointing authority should include the following:

1. Conflicts of interest, implications of partiality, or alleged misconduct as delineated in the ABA Standards Relating to the Prosecution and Defense Function;
2. Appearance of professional impropriety as delineated in Canon 9 of the ABA Code of Professional Responsibility; and
3. Improper influence or obstruction of justice as defined in 18 U.S.C. 1501-1510.

#### *Prosecuting government crimes*

Congress should enact legislation creating a new Division of Government Crimes in the Department of Justice. It should be headed by an Assistant Attorney General nominated by the President and subject to Senate confirmation. Its jurisdiction should include violation of federal laws by government officials, cases referred by the Federal Election Commission, and violations of federal campaign laws.

Mr. MANN. Our final witness today is Mr. Jerry Berman. Mr. Berman is a legislative associate with the Washington office of the American Civil Liberties Union and the director of the Project on Domestic Surveillance at the Center for National Security Studies. He appears today on behalf of the ACLU.

Welcome to the subcommittee, Mr. Berman.

Your prepared testimony will be made a part of the record, and you may proceed as you see fit.

#### **TESTIMONY OF JERRY J. BERMAN, LEGISLATIVE ASSOCIATE, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION**

Mr. BERMAN. I welcome this opportunity to appear on the special prosecutor legislation. The American Civil Liberties Union has testified on this legislation before. Nevertheless, we have a lengthy statement today, which I will try to summarize. Because we are asking for an amendment of a rather substantial nature to this legislation, it will take me some time to develop our case.

In general, we support the thrust of H.R. 2835 and its Senate counterpart, S. 555. However, we do not believe that this legislation goes far enough to provide a special prosecutor mechanism in one critical area. We believe the legislation should be amended to provide more fully for a special prosecutor in the event of abuses of power by U.S. intelligence agencies.

We have particular suggestions to make, but before we do, we think it is important to set forth why the American Civil Liberties Union believes that intelligence agency abuse must be subject to investigation by a special prosecutor and, particularly, why we believe H.R. 2835 is inadequate to accomplish this end.

The ACLU has a very limited policy position on the special prosecutor. As a matter of fact, in some senses it is both more narrow than the reach of this bill and in some senses, broader. We have only supported a temporary special prosecutor in two instances. In terms of our policy, we did support the creation of a temporary special prosecutor to investigate Watergate and related matters. And in 1975, in

the middle of revelations concerning intelligence agency abuses, the ACLU endorsed the creation of a special prosecutor office with respect to the intelligence community.

That office, of course, has not been established, and the ACLU is again supporting legislation in the House which would create a temporary special prosecutor for intelligence agencies. The legislation is title VII of H.R. 6051, the Intelligence Agency Control Act of 1977, and we would like to address the question of whether H.R. 2835 should be amended to conform to this concept.

As the public records demonstrate, Watergate was only the tip of the iceberg and a mere extension of a pattern of official lawlessness that has developed within our intelligence agencies over decades and become a matter of bureaucratic routine. Watergate, as we should recall, involved the Huston plan, the "national security" wiretap program, and the IRS "enemies" program, all of which involved activities of U.S. intelligence agencies. Because they were related matters, they were turned over to the Special Watergate Prosecution Force.

After Watergate came the deluge of revelations implicating U.S. intelligence agencies in massive illegal activities:

The FBI COINTELPRO operations;

The CIA and FBI mail-opening programs;

Operations Shamrock and Minaret, the NSA's cable intercept programs;

The CIA CHAOS operation;

The FBI's warrantless wiretapping program against domestic groups;

The CIA drug-testing program conducted with unwitting subjects;

The IRS Special Services Staff;

Perjury allegations against former CIA Director Richard Helms;

And the FBI "black bag" or burglary program.

These were official illegal acts or conspiracies—at least one could argue that there was "specific information" of violation of U.S. laws (I have a long statement of three or four pages which I call your attention to) detailing these illegal activities with a legal analysis, from a report that I helped to draft with the New York City Bar Association.

The main point, however, is that, unlike Watergate, none of the prosecutorial investigations of these activities has been turned over to a Special Prosecutor. All have been investigated by the Justice Department. And from this myriad of programs involving illegal activity on the part of numbers of Government officials, only one indictment has been sought, arising out of a New York FBI agent's participation in illegal surveillance in the New York area in 1972.

Clearly, these programs should not have been investigated by the Justice Department. This is not meant to impugn the integrity of Attorneys General Richardson, Levi, or Bell, or the investigative staff of lawyers at the Justice Department. Perhaps none of the officials involved in these many illegal activities should have been prosecuted, either because of lack of sufficient evidence, statutes of limitation, good faith defenses, or any number of reasons. The point here is that none of these investigations should have been conducted by the Justice Department because conflicts of interest made it im-

possible for the Department to conduct a full and thorough investigation without at least the appearance of partiality.

Mr. Harmon was here this morning and talked a lot about the appearance of impartiality, and I think this really applies to this situation. There are at least four grounds on which a Special Prosecutor should disqualify him or herself to avoid conflict of interest or the appearance thereof. A prosecutor should not prosecute or investigate his superiors, should not investigate himself, should not investigate persons with whom he has had a close working relationship, and should not carry out an investigation which would give the appearance of partiality, conflict, or impropriety.

In its investigation of intelligence agency abuses, the Department of Justice had to investigate itself, and top officials had to look into possible illegal activity by persons with whom they had a close personal and working relationship.

The records show that in a great many cases, officials inside the Justice Department either initiated, carried out, participated in or knew of the possibility of criminal conduct. The Justice Department was implicated in Cointelpro, mail openings, burglary, illegal wiretapping, and the NSA intercept program. The FBI contributed and received information from the CIA's Chaos operation and aided the IRS special services projects. There is evidence that officials high in the Department chain of command had knowledge of at least some aspect of Cointelpro, the King wiretap, and other programs.

Even though the Attorney General may have been diligent, the conflicting loyalties within the Department and between the Department and the FBI make it difficult to believe that investigations were thorough or that Justice Department involvement in the activity did no militate against prosecution.

The Justice Department learned of Cointelpro in 1971 but did not investigate the program until 1974. Even then, the Department relied on summaries prepared by the FBI which, as it turned out, did not disclose the true nature or extent of illegal activities. It was up to the Senate Intelligence Committee to reveal those activities.

The Justice Department has been conducting criminal investigations while it is defending officials in lawsuits arising out of the same activities. In the Socialist Workers Party lawsuit, the Department for a long time maintained that the FBI committed no burglaries against the Party, only to be confronted with evidence that it had.

The Justice Department stated as part of its rationale for not prosecuting officials involved in mail-opening that the Department had failed to establish adequate guidelines on mail surveillance.

Significantly, the Justice Department also had to investigate itself when it looked into programs conducted by other agencies. The Department's Interdivisional Intelligence Unit collected intelligence from the Army and FBI's questionable surveillance activities. The Bureau was the chief beneficiary of the CIA mail-opening program, and I could go on, including the fact that there was a 21-year agreement between the Justice Department and the CIA in which the Department turned over to the CIA the discretion on whether or not to prosecute CIA agents who had broken the law.

The point is that even Attorneys General otherwise beyond reproach could not avoid the appearance of partiality. Attorney General Levi,

publicly committed to restoring morale in the Department of Justice, could not avoid the appearance of partiality on the part of his Department.

One clear example of the question of partiality is the investigation conducted by the Department into whether the FBI had any part in the King assassination. The Justice Department conducted the investigation. When it concluded the FBI investigation was thorough, Congress appropriated several million dollars to set up an assassination committee to look into the whole thing all over again.

The conflicting demands on the Attorneys General have already surfaced in the Carter administration. You just have to read the newspapers. Griffin Bell has been under obvious pressure not to prosecute FBI agents in the interest of Department morale. Since his authorization of the indictment of an FBI agent for illegal wiretapping and mail-opening, he has been attacked by the FBI for having allowed the Bureau's morale to be lowered and accused of a vendetta because the Department did not also indict the CIA officials engaged in the mail-opening program. He has yet to reach a decision on the perjury allegations against former CIA Director, Richard Helms, but is under pressure not to prosecute from officials who argue that the prosecution will have to disclose national security secrets.

Conflict, potential conflict, and appearance of partiality could have been avoided if a special prosecutor had been appointed to investigate and prosecute violations of law committed by the intelligence community. But no "triggering" mechanism existed, and the discretion to establish a special prosecutor remains with the Attorney General.

The issue is whether Congress will enact legislation that will require a special prosecutor if intelligence agencies engage in further illegal activities.

What I want to do now is to argue in terms of trying to fit this pattern of abuse through H.R. 2835 and see where we would have come out.

My sense in reading this bill is that it is a Watergate reform bill. It lays out the jurisdiction of the special prosecutor in terms of top political officials, including White House officials and Cabinet members. It has in mind a repetition of Watergate.

But much has happened since Watergate, and this legislation really does not speak to it. Even though it includes the Attorney General, the Deputy Attorney General—because of its level II requirement—the Director of the FBI, and the Director of the Central Intelligence Agency within the select group of top officials whose illegal activities require the Attorney General to trigger a special prosecutor, this is far from responsive to the problems presented by intelligence agency abuse.

First, the problem of the Attorney General. Under H.R. 2835, if the Attorney General initiates an illegal intelligence agency program or Watergate burglary, for that matter, he may be subject to investigation by a special prosecutor. However, the Attorney General is allowed to conduct the preliminary investigation to establish whether specific information of a crime is established. In other words, the Attorney General investigates himself. If he concludes that the charges are unsubstantiated, he reports the results of his investigation to the three-judge court, but he is permitted to do so in summary form.

The court must accept the decision of the Attorney General and cannot appoint a special prosecutor over his objection. All it can do is release the summary of the investigation to the public.

If history is any guide, this is wholly inadequate, whether you support the legislation, or whether you are just saying is this legislation workable at all. I can try to imagine the summary that Attorney General Mitchell might have turned over regarding the Liddy plan or the national security wiretap program. Does the release of a summary by the special court advance us beyond where we are today, or for that matter, where we were during the Watergate years?

Mr. MANN. Mr. Berman, we will have to interrupt and go vote. I think we will reconvene—what does your schedule permit?

Mr. BERMAN. I'm late now for some other appointments. When do you think you could reconvene?

Mr. MANN. Well, this is a vote on an amendment. It may be followed by a vote on a bill. We won't know until we get over there, and we may be tied up for 30 minutes, whether we want to or not.

Suppose we try to come back. I expect we will conclude in 15 or 20 minutes.

Mr. BERMAN. Right.

Mr. MANN. So we'll come back immediately.

[Recess.]

Mr. MANN. The subcommittee will come to order.

Mr. Berman, you may proceed.

Mr. BERMAN. When I left off we were discussing the problem of the Attorney General when he is investigating himself, in terms of the summary the court can release. That's where the decision stops, Congress is given a political recourse under section 595(e) of the act. I won't read the section, but it's clear to me that this, except for possibly giving more power to a majority of the minority party of the Congress, leaves the Congress pretty much where it is today under the subpoena power. The Judiciary Committee could call in the Attorney General under present law. Our opinion is that where the Attorney General is concerned, the appointment of a special prosecutor shall be automatic.

Now, by including the Director of the Central Intelligence Agency and the Director of the FBI within the purview of the special prosecutor, we don't think it really reaches the problem of intelligence agency abuse. We think the special prosecutor would seldom be triggered, not because these directors will always be above reproach, but because they have a talent for constructing "plausible denial" for their involvement in dubious activities.

The Justice Department in its investigation of the mail-opening case states quite categorically, that it was unable to trace the line of command or orders to the intelligence community.

The Church committee investigation reached the same conclusion—that only in the rarest of instances could they trace orders to the top of these agencies.

Now, if the directors of the agencies aren't implicated, under this legislation the status quo is almost completely maintained. It is almost wholly up to the Attorney General whether the kind of programmatic abuse committed by investigative agencies are investigated by special prosecutors.

Additionally, if the Director of the FBI is involved in the illegal activity, the Attorney General could but does not have to expand the prosecutorial jurisdiction of a special prosecutor and refer related matters to him under section 592(f) and 593(c). Of course, one solution to this problem is to require the Attorney General to refer related matters.

Without such a requirement, the only way to mandate a special prosecutor for the intelligence agencies under this bill is contained in section 592(2), which is the section which provides that if the Attorney General finds that an investigation or prosecution "may so directly and substantially affect the political or personal interests of the President or the Attorney General or the interests of the President's political party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such an investigation," he can appoint a special prosecutor. But there is under H.R. 2835 no way that this can be enforced, no mechanism for making the Attorney General go forward; it's wholly within his discretion. And the standard is so strict that it's almost as if he were in an impeachment situation already, and Congress has been able to handle that without a special prosecutor mechanism.

If impeachment is not imminent or if related matters are not referred, where there is no direct evidence of Director involvement, the Justice Department may retain jurisdiction over the investigation and prosecution of intelligence agency officials below the rank of Director.

Under H.R. 2835, as drafted, the Justice Department could continue to investigate itself. It would have prosecutorial jurisdiction over top Department officials and the top FBI officials who might have participated in intelligence agency abuses for the Department, or alternatively, who are persons with whom the prosecutors have had a close working relationship. If H.R. 2835 had been statutory law in 1974, the Justice Department could have investigated COINTELPRO, the black bag burglary program, and the mail-opening program without appointing a special prosecutor.

We recommend the amendment of section 591 to include within the category of persons whose criminal activity requires the appointment of a special prosecutor "any Federal officials supervising a clandestine intelligence or counterintelligence activity of Government."

We note that section 593(3) carves out the White House personnel for particular attention. We believe there is compelling reason to recognize that the officials of U.S. intelligence agencies also merit special attention in the interest of restoring and insuring investigation and prosecution of official misconduct.

I will conclude my statement there and say that we have yet to work out the appropriate amendment. Every standard requires some kind of arbitrary cutoff. And so, rather than drafting specific language—we have tried to make it clear who we are talking about rather than saying level IV or level III. That doesn't help us.

For instance, level III officials aren't included under the bill. We don't want everyone in level III included, because our interest doesn't reach that far. But level III of the executive level is where the Deputy Director of the CIA, is—that's the person who is in line

control of the CIA. He would not be subject to special prosecutor investigation under the arbitrary steps that you have set up. Level IV is where your assistant Attorneys General are, and they are involved in many programs in the security branch of the Justice Department. They would not be picked up under the jurisdiction of the special prosecutor. I'm also not sure if any FBI official below the Director of the FBI is covered. Thus we have tried to define it in terms of supervisory officials over intelligence activities, rather than try to work with an arbitrary cutoff.

Mr. MANN. Thank you. As you indicated earlier, you have made a complicated suggestion, trying to cover both grade levels and job descriptions. I realize that the intelligence community has several sensitive problems but would you try to identify that as a subject area? My imagination doesn't come to me at the moment. Are there other subject areas that would be considered of a political nature?

Can you suggest any Federal officials supervising the clandestine intelligence or counterintelligence activity of the Government? You would intend for that to apply to all levels, I gather?

Mr. BERMAN. Anyone in a supervisory position within an intelligence agency. And in answer to your other question, I suppose we could sit and think up other examples that are not covered by this legislation. But it seems to me that the legislation should be responsive to clear historical instances. We are not trying to treat a hypothetical case here. Watergate was not a hypothetical case. This bill was drafted for circumstances where it might not occur again.

Mr. MANN. I agree with that.

Mr. BERMAN. Intelligence agencies have been in this business for a long time; I think that in some respects President Nixon's administration was caught up in 30 years of illegal activity and he got stuck in the glue.

We're talking about agencies who, by law and authority, now and until Congress does something about it, operate in secret beyond accountability. They are an intelligence community, and as a Senate committee has pointed out, they have a different kind of cult, of sense of mission, which has often taken them to the point where they disregard the orders and explicit laws of this country, to the violation of civil rights and liberties of citizens.

And it seems to me that one of the operating suppositions within those agencies has been, and continues to be, that problems will be taken care of within the agencies; that no one need worry about the consequences of his or her acts, because they are outside the legal structure of this country.

And one way to address that problem is to insure investigation and prosecution from outside. Unless the agencies have a sense that someone outside their community is going to look at their activities from a prosecutorial and investigative standpoint, I don't think there's much of a deterrent in any law that this Congress passes.

I think history makes it clear that when you leave the Justice Department in control of prosecution, you are talking about a Department which is a part and parcel of that intelligence community. And a good part of its law enforcement activities are directed toward intelligence activities. And that's just not the F.B.I., but it's also officials inside the Department of Justice itself.

The Justice Department will continue to be an intelligence agency, especially during times of social turmoil in this country. That is, I think, the problem presented. It's on the record, and that it ought to be covered under this legislation if we really want to talk about official public integrity. The intelligence agencies far outdid the Nixon administration in breaking the law.

Mr. MANN. We made a small step this morning when the President entertained the Judiciary Committee of the House in the Rose Garden to announce agreement and apparent consensus with the leadership of the House and the administration on a bill to provide for a court order situation for foreign security intelligence surveillance. In the context of what you are saying, that will be another hearing to be set up for possible abuse.

Mr. BERMAN. The noncompliance would be by the agents in the field, if they went off on their own and the Attorney General doesn't follow the certification procedures outlined in that bill. The American Civil Liberties Union has its problems with that legislation, because we find some vague drafting of a foreign intelligence target under that bill. But I don't want to get to that. We'll leave that for another day.

Mr. MANN. You have not addressed—at least not orally—the question of the possibility of judicial review of the Attorney General's decision not to ask for a special prosecutor. I realize what your main thrust of the statement is, but what is your reaction to that discretion of the Attorney General?

Mr. BERMAN. Well, we have spoken to it in one point—where the Attorney General is involved, possibly with illegal conduct. We don't think he should conduct an investigation of himself. That ought to be an automatic appointment and to remain secret; the special prosecutor doesn't have to announce to the public that he has the Attorney General under investigation.

I know there's a problem of frivolous complaints that are directed to the Attorney General and you don't want to burden the court with that matter. But this bill is only a 5-year experiment. It has a sunset law attached to it. We can see what the burdens are, but we ought to take the Attorney General out of that line of conflict.

The second suggestion that we have made is that if the court, without saying that the court can review and reverse the Attorney General on a decision not to prosecute, the court should have the confidence of the Congress and the Attorney General to be able to look at an investigation and see whether it was thorough or not. The court should be allowed to release the summary; I suppose one of the reasons why the court would do that is to show that there might be something wrong with the summary or to agree with it. Such a provision could, without impugning on the discretion of the Attorney General, at least have the court be able to satisfy itself that the investigation was thorough, or that someone else would be looking at how that investigation was conducted.

And I think if the Attorney General turned over the full investigative file to the court and said it was frivolous, and the court released the investigative file which showed that it was not frivolous, the issue would speak for itself. The only danger is that the court would release irrelevant material to the public which would be embarrassing

or damaging. But we trust the judiciary not to do that. And I think their record has been pretty good on that.

Mr. MANN. Well, thank you so much, Mr. Berman. You have made a contribution to the work of the subcommittee, and we appreciate it very much. Thank you, sir.

Mr. BERMAN. Thank you.

[The prepared testimony of Jerry J. Berman follows:]

STATEMENT OF JERRY J. BERMAN\* AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union welcomes this opportunity to testify on H.R. 2835, the "Special Prosecutor Act of 1977." Legislation along the lines of H.R. 2835 is long overdue. Clearly, we have learned in recent years that investigation and prosecution of officials independent of the Justice Department is essential to insure justice in certain circumstances. H.R. 2835 recognizes this and establishes a "trigger" for a temporary special prosecutor when the circumstances warrant. We therefore endorse the thrust of the legislation.

However, we do not believe that H.R. 2835 goes far enough to provide a special prosecutor mechanism in one critical area. Any legislation designed to insure that high government officials who disobey the law are investigated and prosecuted in a fair and impartial manner must encompass a number of intelligence agency officials not now covered under H.R. 2835's special prosecutor jurisdiction and must impose more strict limits on the discretion of the Attorney General to control the circumstances under which a special prosecutor is triggered. We believed the legislation should be amended to provide more fully for a special prosecutor in the event of abuse of power by U.S. intelligence agencies.

We have particular amendments to offer, but before we do, we think it is important to set forth why the American Civil Liberties Union believes that intelligence agency abuses must be subject to investigation by a special prosecutor and the particular reasons why we believe H.R. 2835 is inadequate to accomplish this end.

The position of the American Civil Liberties Union has been to support a temporary special prosecutor in limited cases where it is abundantly clear that the Department of Justice and the Attorney General can not conduct a prosecutorial investigation in an impartial manner or without giving the appearance of partiality. In recent years, the American Civil Liberties Union has identified two such areas and called for special prosecutors. In 1973 the ACLU endorsed the creation of a Temporary Special Prosecutor Force to investigate and prosecute high government officials implicated in "Watergate" and related matters. In 1975 in the midst of the "revelations" concerning abuses by intelligence agency officials, the ACLU endorsed initiatives to "create . . . a Special Prosecutor's Office with respect to the intelligence community." Because such an office has unfortunately not yet been established, the ACLU vigorously supports congressional enactment of H.R. 6051 recently introduced by Representative Herman Badillo of New York and others. Title VII of this Bill, the "Intelligence Agency Control Act of 1977," creates a 5-year temporary special prosecutor appointed to investigate and prosecute violations of federal law by U.S. intelligence agencies. We believe our reasons for taking this position are compelling and underscore the need for amending H.R. 2835.

As the public record demonstrates, Watergate was only the "tip of the iceberg" and a mere extension of a pattern of official lawlessness that has developed within our intelligence agencies over decades until it has become a matter of bureaucratic routine. Watergate, as we should recall, involved the Houston Plan, the "National Security" wiretap program, and the IRS "enemies" program, all of which involved activities of U.S. intelligence agencies. Because they were "related matters", they were turned over to the Special Watergate Prosecution Force.<sup>1</sup>

\*Jerry J. Berman is a legislative associate at the American Civil Liberties Union Washington Office and also Director of the Project on Domestic Surveillance at the Center for National Security Studies. Mr. Berman is co-author of "The Lawless State" (Penguin 1976) and has written on the issue of Special Prosecutor. His remarks today are on behalf of the American Civil Liberties Union.

<sup>1</sup> Watergate Special Prosecution Force, Report (October 1975).

: After Watergate, came the deluge of revelations implicating U.S. intelligence agencies in massive illegal activity: the FBI COINTELPRO operations; CIA and FBI mail opening programs, Operation Shamrock and Minaret, the NSA's cable intercept programs; the CIA CHAOS operation; the FBI's warrantless wiretapping program against domestic groups; the CIA drug testing program conducted with unwitting subjects; the IRS Special Services Staff; perjury allegations against former CIA Director Richard Helms; and the FBI "black-bag" or burglary program.<sup>2</sup> These were official conspiracies in violation of United States laws.<sup>3</sup>

Section 241 of Title 18 of the United States Code (18 U.S.C. § 241) makes a crime any conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . ." Section 242 of Title 18 of the United States Code (18 U.S.C. § 242) provides for the punishment of anyone who, under color of law, "willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . ."

From 1956 to 1971, the FBI conducted at least five covert action programs (COINTELPROs) against a variety of domestic organizations, some of which were involved only in peaceful protest. Among these latter organizations were the Southern Christian Leadership Conference, many black student groups, and various anti-war groups. The Senate Select Committee on Intelligence Activities found that the actions taken by the FBI in connection with such programs "interfered with the First Amendment rights of citizens. They were explicitly intended to deter citizens from joining groups, 'neutralize' those who were already members, and prevent or inhibit the expression of ideas." Actions taken by the FBI included tactics designed to break up marriages, terminate funding or employment, encourage gang warfare among violent rival groups, disrupt political campaigns, and deter the expression of ideas which the FBI considered dangerous. More than 2,000 proposals for action were approved and carried out.

From 1963 until his death in 1968, the late Dr. Martin Luther King, Jr., was the target of an FBI operation designed to neutralize him as an effective Negro leader. His phones were tapped and his hotel rooms and offices were bugged. He was also placed under physical and photographic surveillance. Efforts were made by the FBI to discredit him with Executive Branch officials, leaders of Congress, religious leaders, universities and the press. Shortly before he was to receive the Nobel Peace Prize, the FBI anonymously mailed to him a tape and an unsigned letter which associates of King said he interpreted as an effort to induce him to commit suicide.

In 1969, the Internal Revenue Service established a Special Services Staff to target groups and individuals for tax examinations because of their political and ideological beliefs and activities. IRS requested the FBI to provide information of organizations of "predominantly dissident or extremist nature" and people identified with them, and the FBI did so. The Staff maintained intelligence files on more than 11,000 individuals and groups until it was abolished in 1973 by the new IRS Commissioner when he discovered its functions were not tax related.

In violation of its charter prohibiting it from exercising internal security functions, the CIA developed a program—Operation CHAOS—to explore the extent of foreign influence on domestic dissidents. CIA agents, while in the United States, provided substantial information about lawful domestic activities of dissident American groups. The CIA in connection with this program accumulated more than 13,000 files, including 7,200 on American citizens and an index of more than 300,000 names. Ostensibly to protect CIA personnel and installations, the CIA also infiltrated Washington based peace groups and Black activist groups and collected general information about radical groups across the country. In

<sup>2</sup> See *Report to the President by the Commission on CIA Activities Within the United States* (June 1975); *Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, United States Senate*, 94th Cong., 2d sess. (1976).

<sup>3</sup> Much of this legal analysis is excerpted from a report by the Committee on Civil Rights of the Association of the Bar of the City of New York, *Intelligence Agency Abuses: The Need for a Temporary Special Prosecutor* (1976). (The Analysis was drafted in substantial part by Jerry J. Berman at the Center for National Security Studies and Ray Calamaro, now Deputy Assistant Attorney General for Legislation in the Department of Justice.

1966, the CIA and FBI entered into an informal agreement regarding CIA's clandestine activity in the United States.

The Army carried on a nationwide intelligence surveillance program, creating files on some 100,000 Americans and a large number of domestic organizations, encompassing virtually every group seeking peaceful change in the United States, including the Urban League, the National Organization of Women, the NAACP, and the Anti-Defamation League of B'nai B'rith. Although Army collection plans, which were circulated to the Justice Department, did not mention techniques of collection, the information described could have been collected only by covert surveillance. The Justice Department never objected.

Section 1702 of Title 18 of Code (18 U.S.C. § 1702) prohibits the taking of mail with "design to obstruct the correspondence, or to pry into the business or secrets of another . . ." Both the CIA and the FBI conducted mail opening programs over periods of many years which were directed at mail sent or received by U.S. citizens on watch lists designed to monitor international mail. The Rockefeller Commission concluded that the CIA mail opening programs were "unlawful." The FBI terminated its program in 1966 but continued its use of the CIA program and submitted the names of domestic dissidents to the CIA for its watch list. More than 300,000 first class letters were opened, including the mail of the Federation of American Scientists, John Steinbeck, Senators Kennedy and Church and numerous American peace groups such as the American Friends Service Committee and Women Strike for Peace.

State and local laws prohibit burglary and Section 2236 of Title 18 (18 U.S.C. § 2236) prohibits searches without judicial warrant except in certain very limited cases. Over a period of years, the FBI and CIA conducted hundreds of break-ins or "black-bag jobs," without judicial warrant, many of which were against American citizens. In some cases break-ins were to install microphones, in other cases to steal such items as membership lists.

Section 2511 of Title 18 (U.S.C. § 2511) prohibits, generally, electronic surveillance without judicial warrant. Over many years, the National Security Agency intercepted millions of private messages transmitted by electronic means to or from the United States. Under one program, NSA obtained essentially all cables to or from this country. From the early 1960's to 1973, NSA compiled a list of individuals and organizations, including 1200 American citizens and domestic groups, whose communications were intercepted, transcribed and frequently disseminated to other agencies for "intelligence purposes." "The Americans on this list, many of whom were active in the anti-war and civil rights movements, were placed there by the FBI, CIA, Secret Service, Defense Department and NSA itself without prior judicial warrant. . . ." The FBI carried out in this country over a period of many years warrantless electronic surveillance of numerous individuals and domestic groups.

Section 1905 of Title 18 (18 U.S.C. § 1905) makes it a crime for a government official to permit any income tax return to be seen by any person except as provided by law. Until 1968 the FBI obtained tax returns from the IRS surreptitiously without filing applications with the IRS Disclosure Branch as required by regulations. After 1968, apparently, the FBI followed the required application procedures but the CIA continued to receive tax return information without filing requests. Even after formal requests were required, the IRS, which is required to release tax information only when necessary, accepted the Justice Department's undocumented assertions that the requested tax information was "necessary."

#### **MOST FBI REQUESTS FOR TAX INFORMATION WERE FOR TARGETS OF VARIOUS COINTELPRO OPERATIONS**

This is not meant to constitute an exhaustive list of the possible violations of criminal law by federal intelligence agencies. Various CIA officials may have violated provisions of the federal criminal code in view of the findings of the Church Committee that United States officials instigated, aided, abetted or acquiesced in plots to assassinate at least five foreign leaders. The CIA and its officials may also have violated statutes prohibiting the destruction of public records (18 U.S.C. § 2071) when they destroyed files on drug testing programs, and Richard Helms, the former Director of the CIA, may have committed perjury before Congressional committees (18 U.S.C. § 1001) in testifying about the CIA role in Chile and Watergate.

Unlike Watergate, however, none of the prosecutorial investigations of these activities has been turned over to a special prosecutor. All have been investigated by the Justice Department. And from this myriad of programs involving illegal activity on the part of numbers of government officials, only one indictment has been sought, arising out of a New York FBI agent's participation in illegal surveillance in the New York area in 1972.<sup>4</sup>

Clearly these programs should not have been investigated by the Justice Department. This is not meant to impugn the integrity of Attorneys' General Richardson, Levi, or Bell, or the investigative staff of lawyers at the Justice Department. Perhaps none of the officials involved in these many illegal activities should have been prosecuted, either because of lack of sufficient evidence, statutes of limitation, good faith defenses, or any number of reasons. The point here is that none of these investigations should have been conducted by the Justice Department because of conflicts of interest that made it impossible for the Department to conduct a full and thorough investigation without the appearance of partiality.

There are at least four grounds on which a prosecutor should disqualify him or her self to avoid conflict of interest or the appearance of bias. Three were manifest when the Justice Department undertook to investigate intelligence agency abuses: (1) no prosecutor should investigate his superiors; (2) no prosecutor should investigate if he may in any way be implicated in the crimes under investigation; (3) no prosecutor should investigate persons with whom he has had a close personal or working relationship; and (4) no prosecutor should carry out an investigation which could give the appearance of partiality, conflict or impropriety. As required by the American Bar Association's Standards Relating to the Prosecution Function and Defense Function, a prosecutor should "avoid the appearance or reality of a conflict with respect to his official duties."<sup>5</sup>

In its investigation of intelligence agency abuses, the Department of Justice had to investigate itself and top officials had to look into possible illegal activity by persons with whom they had a close personal and working relationship. For example, the record shows that in a great many cases, officials inside the Justice Department either initiated, carried out, or participated in possible criminal conduct. The FBI was implicated in COINTELPRO, mail openings, burglary, illegal wiretapping, and the NSA intercept program. The FBI contributed and received information from the CIA's CHAOS operation and aided the IRS Special Services project. There is evidence that officials high in the Department's chain of command had knowledge of at least some aspects of COINTELPRO, the King wiretap, and other programs. Even though the Attorney General may have been diligent, the conflicting loyalties within the Department and between the Department and the FBI made it difficult to believe that investigations were thorough or that Justice Department involvement in the activities did not militate against prosecution. The Justice Department learned of COINTELPRO in 1971 but did not investigate the program until 1974. Even then the Department relied on "summaries" prepared by the FBI which, as it turned out, did not disclose the true nature or extent of illegal activities. Defending the FBI in the Socialist Workers Party lawsuit, the Department for a long time maintained that the FBI committed no burglaries against the party, only to be confronted with evidence that it had. The Justice Department stated as part of its rationale for not prosecuting officials involved in mail-opening the fact that the Department had failed to establish adequate guidelines on mail surveillance.<sup>6</sup>

Significantly, the Justice Department had to investigate itself when it looked into programs conducted by other agencies. The Department's Interdivisional Intelligence Unit (IDIU) collected intelligence from the Army and FBI's questionable surveillance activities. The Bureau was the chief beneficiary of the CIA mail-opening program and had knowledge of its operation. The FBI supplied "watch lists" to the NSA for the cable-intercept program of that agency. The IRS collected much of its information on dissidents from the FBI and the FBI used information developed by the IRS for its intelligence and counter-intelligence operations. The Justice Department and the CIA also had a 21

<sup>4</sup> Justice Department Press Release, Apr. 7, 1977.

<sup>5</sup> New York City Bar Reports, *op. cit.*, n. 2.

<sup>6</sup> Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions With Respect to Central Intelligence Agency Mail Opening Activities in the United States (Jan. 14, 1977).

year Agreement under which the Department delegated to the CIA its statutory duty to investigate and determine whether or not to prosecute crimes on behalf of the United States when CIA personnel were implicated in illegal activity.

The Justice Department gave an appearance of partiality by defending intelligence agency officials in a number of civil suits arising out of the mail-opening, wiretapping, cable-intercept, and COINTEL programs. In one example the Department was defending the CIA agents involved in the mail-openings program in civil litigation before it had completed its criminal investigation of these same agents. The Department concluded that because of a "good faith" defense convictions were unlikely and decided against prosecution.<sup>7</sup>

Even Attorneys General otherwise above reproach could not avoid the appearance of partiality. Attorney General Levi, publicly committed to restoring morale in the Department of Justice, gave the appearance of partiality every time the Department decided not to prosecute. The conflicting demands on the Attorney General have also surfaced in the new Administration. Griffin Bell has been under obvious pressure not to prosecute FBI agents in the interests of Department morale. Since his authorization of the indictment of an FBI supervisor for illegal wiretapping and mail-opening, he has been attacked by the FBI for having allowed the Bureau's morale to be lowered and accused of "a vendetta" because the Department did not also indict the CIA officials who engaged in mail-opening.<sup>8</sup> He has yet to reach a decision on the perjury charges against former CIA Director Richard Helms but is under pressure not to prosecute from officials who argue that the prosecution will have to disclose "national security" secrets.<sup>9</sup>

Conflict, potential conflict, and appearance of partiality could have been avoided if a special prosecutor had been appointed to investigate and prosecute violations of law committed by the intelligence community. But no "triggering" mechanism existed and the discretion to establish a special prosecutor office remained with the Attorney General. The issue is whether Congress will enact legislation that will require a special prosecutor if intelligence agencies engage in further illegal activities.

#### ANALYSIS OF H.R. 2835

H.R. 2835 attempts to insure the establishment of a special prosecutor in the event of another "Watergate." It recognizes that the office of Attorney General is a "political" entity—and not independent of the President, and takes steps to insure that a prosecutor does not stand in the position of prosecuting his superiors. Anticipating another Watergate type situation, Section 591 requires the Attorney General to request a 3-Judge Special Court to appoint a special prosecutor when he or she has substantiated "specific information" that the President, Vice-President, members of the Cabinet, officials just below Cabinet rank, top White House employees, or the President's campaign manager are involved in violations of federal law. It is a Watergate Reform Bill.

However, H.R. 2835 does not adequately provide a mechanism to trigger a special prosecutor to investigate intelligence agency abuses. While it recognizes that a prosecutor should not prosecute his superiors, it does not address the conflict inherent in the intelligence agency situation of allowing the Department of Justice the discretion to prosecute itself, close working associates, or persons under circumstances that give the appearance of partiality. Under this legislation, the Department of Justice would retain the discretion to prosecute any repetition of most of the illegal programs conducted by the intelligence agencies. From our point of view, this begs the question and should be rectified.

#### *Limitations on Special Prosecutor appointment under H.R. 2835*

As an intelligence abuse reform measure, section 591 includes only the Attorney General, the Director of the FBI, and the Director of Central Intelligence within the select group of top officials whose illegal activities require the Attorney General to "trigger" a special prosecutor. This is far from responsive to the problems presented by illegal intelligence activity.

First, the problem of the Attorney General. Under H.R. 2835, if the Attorney General initiates an illegal intelligence agency program (or a Watergate-type

<sup>7</sup> *Ibid.*

<sup>8</sup> Goshko, John M., High FBI Official Claims "Vendetta" on Burglaries, *Washington Post*, Apr. 13, 1977 (A-2).

<sup>9</sup> *New York Times*, Feb. 15, 1977, p. 15.

burglary for that matter), he may be subject to special prosecutor investigation. However, the Attorney General is allowed to conduct the preliminary inquiry to establish whether "specific information" of crime is substantiated. In other words, the Attorney General investigates himself. If he concludes that the charges are unsubstantiated, he reports the results of his investigation to a 3-Judge Court, but is permitted to do so in "summary" form. The Court must accept the decision of the Attorney General and cannot appoint a special prosecutor over the Attorney General's objection. All it can do is release the "summary" to the public.

If history is any guide this is wholly inadequate. Imagine the "summary" that Attorney General Mitchell would have turned over regarding the "Liddy Plan" or the "national security" wiretap program. Does the release of a summary by the 3-Judge Court advance us beyond where we are today or for that matter where we were during the Watergate years? Attorney General Mitchell and then Deputy Attorney General Richard Kleindienst offered such "summaries" to the Congress. Eventually Congress had to investigate the charges on its own and force the appointment of a special prosecutor.

Under Section 595(e) of this Act, the Congress is allowed a political recourse: "A majority of majority party members or a majority of all non-majority members of a judiciary committee of either House of the Congress may request in writing that the Attorney General apply for the appointment of a special prosecutor under this chapter."

If the Attorney General does not act, he has to explain why in writing and the Congress can release his explanation. We understand the purpose of this provision, but how does it differ from what the Congress did during Watergate or can do today? In fact the Congress may be able to obtain more information under its present subpoena power. If this legislation is going to work at all, the Attorney General should not be allowed to investigate himself or control the appointment of a special prosecutor when he is implicated in illegal activity. Where the Attorney General is concerned, the appointment of a special prosecutor should be "automatic."

*Second, the problem of the Director of the FBI and the Director of Central Intelligence.*—By adding these officials to the list of persons requiring the Attorney General to "trigger" a special prosecutor, the legislation acknowledges but does not solve the problem of intelligence agency abuse. A special prosecutor will seldom be triggered, not because these directors will always be above reproach, but because they have a talent for constructing "plausible denial" for their involvement in dubious activities. In only rare instances has any investigation conducted into the activities of the intelligence agencies nailed down precisely whether or not "orders" were given at the top. Most intelligence agency investigations have to proceed from the bottom-up to uncover possible Director involvement. As a consequence this legislation would leave most intelligence agency investigations right where they are today, in the Justice Department, which as we have shown, often investigates itself in these matters.

*Third, the problem of intelligence agency officials below the rank of Director.*—Under this legislation, the status quo is maintained. It is almost wholly up to the Attorney General whether the kinds of "programmable" abuses committed by agency officials are investigated by a special prosecutor. For example, if the Director of the FBI is involved, the Attorney General could but does not have to "expand the prosecutorial jurisdiction of a special prosecutor" and refer "related matters" to him under section 592(f) and 593(c). Of course, the solution is to require the Attorney General to refer related matters.

Without such a requirement, the only way to mandate a special prosecutor for the intelligence agencies under this Bill is contained in section 592(2). The Attorney General is required in any criminal investigation to request the appointment of a special prosecutor if the investigation or prosecution

"May so directly and substantially affect the political or personal interests of the President or the Attorney General or the interests of the President's political party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such investigation."

Although the section attempts to restrict the discretion of the Attorney General, and might apply to intelligence agency abuses although intended to cover a Watergate affair, it is so strict a standard as to be almost meaningless. The standard suggests that "impeachment" is imminent. Moreover, we can find no mechanism for enforcing the obligation in these circumstances.

If impeachment is not imminent or if related matters are not referred or there is no direct evidence of Director Involvement, the Justice Department may retain jurisdiction over the investigation and prosecution of intelligence agency officials below the rank of Director. Under H.R. 2835 as drafted, the Justice Department could continue to investigate itself. It would have prosecutorial jurisdiction over top Department officials and top FBI officials who might have participated in intelligence agency abuses for the Department, or alternately, who are persons with whom the prosecutors have had a close working relationship. If H.R. 2835 was statutory law in 1974, the Department could have investigated COINTELPRO, the "black-bag" burglary program, and the mail-opening program without appointing a special prosecutor.

We do not believe section 528 provides an answer to this problem. Under it, the Congress defers to the Attorney General to promulgate rules respecting prosecutorial disqualification for the Department. While the Department should do so, the Congress should establish statutory guidelines in clear-cut cases. We believe the Congress has the information and the capacity to resolve the intelligence agency problem now, and should not defer to the Department on a matter which it has to date been unable to resolve voluntarily to anyone's satisfaction.

To rectify the situation, we recommend the amendment of section 591 to include within the category of persons whose criminal activity requires the appointment of a special prosecutor "any federal official supervising a clandestine intelligence or counterintelligence activity of government." Section 593(3) carves out the White House personnel for particular attention. We believe there is compelling reason to recognize that the officials of U.S. intelligence agencies also merit special attention in the interest of restoring and insuring investigation and prosecution of official misconduct.

#### *Problems with the Attorney General "trigger"*

The power of the Attorney General to invoke the special prosecutor mechanism is almost total. If he recommends against the appointment after conducting a preliminary investigation to substantiate that a violation of law may have occurred, his or her decision is final. The court must accept his "summary" conclusions and the Congress can only ask him to show cause why a prosecutor should not be appointed. We think that without impairing his discretion, certain changes should be made to insure that the Attorney General's investigations are conducted in a responsible manner.

First, we have already mentioned our concern that the Attorney General has final say over an investigation where he may be implicated in illegal conduct. We recommend "automatic" appointment of a special prosecutor to investigate the allegations. If the special prosecutor finds the charges without merit after conducting a "preliminary investigation" for sixty days, he should, at the request of the Attorney General, make the findings public.

Second, we do not believe the Attorney General should be able to "summarize" any investigation to a Special Court. The Special Court should have access to the total investigative file. This insures a check on the Department of Justice. If the Court disagrees with the Attorney General's decision not to prosecute, it may at least release more than a summary to the public. Of course, this presumes a responsible Court, and we recognize the problem. We see no other way, however, to have meaningful oversight over the Attorney General in matters where conflict may be involved. It is important that an investigation by the Attorney General is "thorough."

#### *Other Problems*

We have a few other questions about the Bill as drafted. For example, at what point does a special prosecutor announce publicly his "jurisdiction"? This is not specified in section 593. We think it should be at the point the prosecutor decides to seek an indictment. Secrecy is essential to protect the innocent person during an investigation. But the jurisdiction must be announced at some point to avoid a star chamber proceeding.

Under section 593(b), it states that the Court shall "define . . . (the) special prosecutor's prosecutorial jurisdiction." Can the Court define it beyond the allegations of illegal conduct presented to it by the Attorney General?

Then, under section 594(d), it is not clear from the drafting that the Department of Justice must supply the kinds of information listed that the special prosecutor may request. Of course, the Department should.

## SUMMARY AND RECOMMENDATIONS

We applaud the efforts of the Congress to translate the lessons of Watergate into law. We are hopeful that the Congress will share our perception that intelligence agency abuses were an extension of Watergate and far more dangerous, because conducted in secret and beyond accountability of any kind. A special prosecutor mechanism for the intelligence agencies is necessary, both to insure that justice is done in the future, and to act as a deterrent to illegal intelligence agency activity. We can pass laws to control the agencies but unless agency officials understand that next time they will be prosecuted for violating the laws, those laws will be worthless and our democracy imperiled. A special prosecutor is such a message, and H.R. 2835 should be amended as follows:

(1) Section 591 should be amended to include "any federal official supervising a clandestine intelligence or counterintelligence activity of government";

(2) Section 592 should be amended to provide that if "specific information" involves possible violation of law involving "abuse" of the office of Attorney General, a special prosecutor should be appointed to conduct the *preliminary investigation* and make the determination if further investigation or prosecution is warranted;

(3) Section 592(b)(2) should be amended to provide that notification shall contain the information received and the results of any preliminary investigation;

(4) Section 592(f) should be amended to state that "The Attorney General *shall* ask a special prosecutor to accept referral of a matter that relates to a matter within that special prosecutor's prosecutorial jurisdiction."

Mr. MANN. This concludes the hearing. No additional hearing is contemplated on this legislation, but our record will be kept open until at least Friday, June 10, for the receipt of statements from interested parties.

This hearing is adjourned.

[Whereupon, at 1:40 p.m., the hearing was adjourned.]



## APPENDIXES

### APPENDIX 1

#### Statements submitted for the Record:

##### STATEMENT BY HON. JOHN F. BRECKINRIDGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Mr. Chairman, I am pleased to appear today before the Criminal Justice Subcommittee to speak in favor of H.R. 4292, a bill which would amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases and the promulgation of conflict of interest regulations for Department of Justice officials by the Attorney General. As a former Attorney General of Kentucky during 1960-1964 and 1968-1972, respectively, I am keenly interested in the passage of this legislation. Briefly, the bill provides for the appointment by a special panel of the United States Court of Appeals for the District of Columbia of a temporary special prosecutor if the Attorney General receives information warranting investigation and prosecution regarding the participation in federal offenses of certain specified and former executive branch officers, including the President and Vice President. The Attorney General is required to apply to the judicial panel for the appointment of a special prosecutor if he finds the information he has received warrants further investigation or prosecution; or, if such a determination is not made by him after sixty days; or, if, in the course of a criminal investigation, he determines that continuation may directly affect the political interests of the President or the Attorney General, making it inappropriate for the Department of Justice to proceed. The Judiciary Committees of either House of Congress may also request the Attorney General to apply for the appointment of a special prosecutor and seek a court order commanding the Attorney General to comply with provisions of the bill.

A temporary special prosecutor appointed under this bill may only be removed, other than by impeachment, by the Court panel for extraordinary improprieties or incapacitation. He is to make reports to the Congress and the Court panel on his activities and is to inform the appropriate congressional committee of information relevant to impeachment. The special Court panel, which is empowered to appoint special prosecutors, is to be chosen by the Chief Judge of the United States Court of Appeals for the District of Columbia from among other judges, or retired judges for two-year terms. While serving on the panel, judges may not participate in matters involving the special prosecutor. Finally, the bill requires the Attorney General to promulgate rules and regulations requiring the disqualification of Department of Justice officers and employees in conflict of interest situations.

Watergate, ordinary common sense and sound practice teaches that it is asking too much to expect thorough and disinterested criminal investigation and prosecution when the one conducting the prosecution is also, in effect, its target. It is incongruous to have an investigation of the executive branch by a prosecutor who is under the control or direction of the President or someone under his control.

In addition, this matter merits consideration by the Congress due to the differences in selection methods for Attorney General's between the State and Federal Governments. Attorney Generals are popularly elected in 42 States, appointed by the Governor in 6 States and 3 Territories; in Maine is selected by the legislature and in Tennessee by the Supreme Court.

A variety of reform proposals have been forthcoming in the wake of Watergate. Permanent special prosecutor officers were proposed by the Senate Watergate Committee and the Ford Administration. A temporary office, with appropriate triggering mechanisms, has been favored by the American Bar Association and former Watergate Special Prosecutors. Various appointing and removal provisions have been endorsed.

While the current lack of scandal and controversy, and the incumbent Administration's efforts to depoliticize the Department of Justice may appear to diminish the urgency of enacting special prosecutor legislation, it is in just such a period that dispassionate examination of this issue is possible. Furthermore, as most who have studied the question have concluded, some basic institutional reform is necessary rather than reliance on ad hoc, often belated measures, when egregious cases arise. The problem comes in balancing constitutional and administrative concerns and instituting reforms not disruptive or subversive of the basic scheme of our government and separation of powers, while insuring the impartial administration of justice—an equally central value in a democratic society.

Court appointment of temporary special prosecutors under specifically defined circumstances strikes the power balance. The prosecutors appointed under H.R. 4292 would be both special and temporary, thus properly leaving to the Department of Justice the primary responsibility for enforcement of the laws. Appointment by a special panel of judges, and removal only under certain conditions, insures the necessary independence of investigations and prosecutors involving executive branch officials. Special prosecutors appointed under the bill are to have all the investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General, thus making clear the limited role of the court with respect to these officers, and recognizing the salutary principle of prosecutorial discretion.

A central issue in the debate over special prosecutor legislation has been the question of who appoints and removes. Appointment by the executive branch, even with strict limitations on removal, did not save one special prosecutor—a strong argument for Court appointment and removal. However, the judiciary must not be placed in the position of overseeing a criminal prosecution. H.R. 4292 provides only that the Court appoint a temporary special prosecutor, initially define his jurisdiction, and remove him only under specifically defined circumstances. It has no discretion whether to appoint a special prosecutor, once it receives an application from the Attorney General. The Court panel does not supervise or participate in the criminal investigation or prosecution. The judges on the panel may also not participate in matters involving the special prosecutor, thus alleviating some objections which have been voiced to court appointment of prosecutors.

Congress also has an interest in the impartial administration of justice, and H.R. 4292 provides that the temporary special prosecutor is to report on his progress to committees of Congress. The judiciary committees may also request the special prosecutor to apply for court appointment of a special prosecutor and may seek court ordered compliance by the Attorney General of provisions of the bill. Information developed by the special prosecutor relevant to impeachment must also be given to the appropriate House committee. Thus, informed congressional oversight is achieved while prosecutorial independence is maintained.

The reforms embodied in H.R. 4292 are experimental and touch upon sensitive constitutional and policy matters. The bill, therefore, contains a sunset provision whereby it expires after five years. H.R. 4292 constitutes a measured response to a problem which potentially always exists—the politicization of the administration of justice. As such, it deserves support.

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COMMON CAUSE,  
Washington, D.C., May 25, 1977.

HON. JAMES R. MANN,  
*Chairman, Judiciary Subcommittee on Criminal Justice, House of Representatives, 2137 Rayburn Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: Enclosed is Common Cause's statement for the record on H.R. 2835, which would establish a mechanism for the appointment of a special prosecutor.

Common Cause strongly endorses this bill, and we appreciate this opportunity to express our views on it.

Sincerely,

FRED WERTHEIMER,  
Vice President for Operations.

Enclosure.

#### STATEMENT OF FRED WERTHEIMER ON BEHALF OF COMMON CAUSE

Common Cause commends the Criminal Justice Subcommittee, under the leadership of Chairman Mann, for beginning work early in this session on legislation to establish a mechanism for the appointment of a special prosecutor. H.R. 2835 addresses the very real need to strengthen the procedures for investigation and prosecution of official corruption.

A poll by Louis Harris last November indicated that 88% of the American people felt that the highest priority for this Congress was to "clean up corruption in government." Abuse of power obviously remains a top concern in citizens.

One of the most serious problems in the past concerning integrity in the federal government has been the absence of institutions and processes which can be depended upon to move vigorously and without bias against high level official corruption and abuse of power. While there are a number of laws and regulations aimed at curbing official corruption and abuse of power, enforcement, until recently, has been virtually non-existent. Former President Ford and Attorney General Levi deserve much credit for establishing a new Public Integrity Section in the Justice Department last year which has since been active in this area.

Equally important, the potential for political abuse of what enforcement mechanisms there are has been clearly demonstrated by the Watergate affair. Firm steps must be taken to promote effective enforcement of anti-corruption measures and to depoliticize the administration of justice.

Common Cause strongly endorses H.R. 2835, which is aimed at meeting those objectives. It would establish a mechanism for the appointment of a temporary special prosecutor to investigate and prosecute criminal violations by high executive branch officials.

The difficulty faced by an Attorney General when presented with violations of law at the highest levels of government is clear. Even if the Attorney General does conscientiously and thoroughly investigate, and determines for good reasons that the Department should not prosecute, the appearance of bias and partiality is created. The mechanism for triggering appointment of a special prosecutor takes the Attorney General out of that untenable position. As former Watergate special prosecutor Archibald Cox said, individuals appointed by the President and answerable to him should not investigate and prosecute crimes involving the White House:

"The pressures, the divided loyalty are too much for any man, and as honorable and conscientious as an individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential".

The special prosecutor mechanism recognizes that the Attorney General is not only the highest law enforcement officer in the government, but is also a political appointee answerable to the President.

The extraordinary series of events that led to the appointment and dismissal of Archibald Cox demonstrated emphatically the need to establish a more reliable mechanism, outside the sole initiative and discretion of the executive, for the creation of a special prosecutor in cases where aggressive and independent investigation of high-ranking officials is necessary.

A similar, but related, and more recent experience demonstrates that the same need also exists when the Justice Department is called upon to investigate persons within its own Department, or when special relationships exist between the Department and other agencies, such as the CIA.

Attorney General Bell has been under increasing pressure from FBI Director Kelly and other FBI employees as a result of Justice's prosecution of FBI agents for burglaries and other illegal surveillance activities. For example, Assistant FBI Director Andrew J. Decker asserted in a recent speech:

"It is quite difficult for us to understand the necessity for this prolonged investigation [of FBI employees' illegal activities] unless we reach the inescapable conclusion that a small segment of Justice Department employees is engaging in a vendetta spawned by smoldering hostility for the FBI."

While the Attorney General is proceeding with the prosecution, despite intense internal pressures to drop it, we cannot assume that every Attorney General would continue or even initiate such action in the face of such widespread employee opposition.

As the New York City Bar Association has pointed out in the past with respect to the special prosecutor issue:

"No administrator can function effectively and be insensitive to such serious division within his own command. As much as one may agree with the Attorney General . . . , clearly they have generated mounting pressure against his continuing to act in a way which seems to divide his subordinates and erode morale. The Attorney General, any Attorney General, must be sensitive to such 'inside' political pressures." (The Committee on Civil Rights, Association of the Bar of the City of New York, "Intelligence Agency Abuses" The Need for a Special Prosecutor," May 20, 1976, pp. 10-11).

The same kinds of problems arose during discussions of whether the Justice Department would investigate abuses by the other Intelligence agencies. Although ultimately the decision was made not to bring charges against CIA employees, the longstanding agreement between Justice and the CIA, whereby Justice delegated to the CIA its duty to investigate possible criminal action in certain cases, made it doubtful that Justice could have investigated any criminal acts by CIA employees with the appearance of impartiality.

Recently, the Attorney General reported that in 1976, Justice's Office of Professional Responsibility conducted 152 investigations of misconduct by its own employees. Conceding that some of the charges were serious, he said that nevertheless the investigations indicated that the conduct "fell short of criminal offense." While we commend the Department for its activity in this area, we believe that "self-investigation" of this nature creates the appearance of bias.

Common Cause strongly believes that a special prosecutor mechanism is needed. H.R. 2835 calls for a special prosecutor to be appointed by the U.S. Court of Appeals for the District of Columbia, unless the investigation by the Attorney General of allegations of specific criminal conduct by very high-ranking officials indicates that the charge is "so unsubstantiated that no further investigation or prosecution is warranted." Officials whose conduct is at issue are Cabinet level appointees, White House officials, Executive Level IV appointees, and the President, Vice President, and FBI Director.

Activity which could trigger the appointment process is the criminal violation of law related to abuse of office, elections and campaigns, obstruction of justice and perjury, and defrauding the United States. We recommend that the violation of any criminal law replace these specific categories of criminal statutes. The same difficulties faced by the Attorney General would apply even if the allegations concerned criminal violations of law other than those specified by section 591(a).

We also agree with the New York City Bar Association that "internal" pressures on the Justice Department and associated appearance problems must be recognized. For that reason, we urge that allegations concerning more than isolated and purely individual instances of criminal conduct by Justice Department employees be made another trigger for the appointment of a special prosecutor.

Finally, we recommend that a third trigger for a special prosecutor be criminal wrongdoing by a supervisory employee in the carrying out of an intelligence or counter-intelligence mission. We believe such a provision would appropriately recognize the inter-relationship between the Justice Department and the CIA, and that the Justice Department may have a conflict when asked to investigate or prosecute criminal wrongdoing in other intelligence agencies.

The Senate counterpart to H.R. 2835, S. 555, proposes the establishment of an Office of Government Crimes in the Justice Department, which would have jurisdiction over criminal violations of Federal conflict of interest statutes, election, lobbying and campaign laws; and prosecutions and investigations of criminal violations of Federal law by state or local government officials.

We strongly support this proposal, and urge the Subcommittee to include a similar provision in H.R. 2835. We believe that the functions which this office would carry out are extremely important, and would insure that Federal anti-corruption efforts are highly visible, concentrated and institutionalized within the Justice Department. At the same time, we believe that the legislation should take care not to cut back on any of the existing jurisdiction presently held by the Public Integrity Section of the Department.

Mr. Chairman, the time has clearly come for the establishment of enforcement mechanisms to deal with corruption and abuse of power. We appreciate this opportunity to present our support for H.R. 2835 and stand ready to work with this Subcommittee on behalf of its adoption.

## APPENDIX 2

Statements submitted at the request of the Subcommittee on Criminal Justice on the special prosecutor bills (together with correspondence):

CONGRESS OF THE UNITED STATES,  
COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., May 25, 1977.

Prof. GEORGE D. HAIMBAUGH,  
University of South Carolina School of Law,  
Columbia, S.C.

DEAR PROFESSOR HAIMBAUGH: I am informed by Subcommittee Counsel that you have agreed to examine some of the constitutional questions raised by H.R. 2835 and H.R. 2711, special prosecutor legislation. I am sure your analysis of the standing, case or controversy and separation of powers issues presented in these measures will be very beneficial to the Subcommittee as we continue our work on this legislation. Your efforts on behalf of the Subcommittee are greatly appreciated, and we will include your comments in our final hearing record.

I am advised that Ashley Thrift, Counsel to the Subcommittee, has spoken with you about this project and has sent you the materials necessary to direct your research efforts. If you need any additional materials or assistance please contact Mr. Thrift at (202) 225-0406.

Kind regards,  
Sincerely,

JAMES R. MANN,  
Chairman, Subcommittee on Criminal Justice.

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UNIVERSITY OF SOUTH CAROLINA,  
Columbia, S.C., July 11, 1977.

Hon. JAMES R. MANN,  
Chairman, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MANN: I write in response to the request that I give consideration to the constitutionality of the provision in S. 555 (page 52, line 14-24, p. 53, lines 1-2) which requires the specified division of the [federal] court to review a record of any determination of the Attorney General that a special prosecutor is not required under the standards set forth in § 592(b)(1) of the bill; and to a further request that consideration be given to the constitutionality of the provision in H.R. 2711 at page 6, lines 21-25 which permits the United States District Court for the District of Columbia to order the Attorney General to comply with certain provisions of the bill.

The constitutional issue in S. 555 would seem to be whether the mandatory review provision exceeds the Article III, Section 2 "Cases" and "Controversies" limitation on the extent of federal judicial power as viewed against the broader background of a strong but not absolute doctrine of the separation of powers. The strongest constitutional doubts are based upon the standing aspect of the Constitution's case or controversy requirement. The nature of this barrier to judicial review is suggested by the following excerpts from two United States Supreme Court opinions delivered forty-five years apart:

First, a due process attack on the Maternity Act of 1921 was rejected in *Frothingham v. Mellon*, 262 U.S. 447, 488-9 (1923), for the lack of "some direct injury

suffered or threatened, presenting a justiciable issue." The Supreme Court's opinion concluded that to have granted standing to Mrs. Frothingham would have required them "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

Second, by distinguishing between general grants of and specific limitations on Congressional power, Chief Justice Warren and the Court majority found standing for one who brought an Establishment Clause challenge to the Elementary and Secondary Education Act of 1965 in *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Even there the Chief Justice's formulation of the test for standing contained the same essential elements found in *Frothingham*: "[T]he emphasis in standing problems is on whether the party invoking federal court jurisdiction has a personal stake in the outcome of the controversy . . ." "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

What is meant by forms "historically viewed as capable of judicial resolution," has been answered differently by such legal scholars as Coke,<sup>1</sup> Frankfurter and Landis,<sup>2</sup> Jaffe,<sup>3</sup> Bickel,<sup>4</sup> Berger,<sup>5</sup> and Wechsler.<sup>6</sup> The question that runs through their protracted and continuing debate is whether or not a stranger who lacks personal interest may challenge governmental action as a matter of right or only at the discretion of the Court and/or through Congressionally created standing.<sup>7</sup> But the scholars have paid little heed to the different question presented by S. 535—i.e., whether or not the court may review an executive branch decision in a proceeding that does not provide for the appearance before it of either a plaintiff or a defendant. The limited role guaranteed for the Attorney General whose determination is at stake in such a proceeding is far more circumscribed than that enjoyed by a party defendant.

Despite some lowering, from time to time, of the standing barriers to adjudication, the following recent United States Supreme Court opinions reveal that all members of the Court today hold, albeit in varying degrees, to a constitutional Case or Controversy standard which they interpret as requiring moving parties who can prove injury or interest whether their claims be based upon direct or relational injury or interest or upon statutory status:

#### CHIEF JUSTICE BURGER

"[O]ne generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'" — *United States v. Richardson*, 418 U.S. 166, 171 (1974).

The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a "personal stake in the outcome" [*Baker v. Carr*, 369 U.S. 186, 204 (1962)], or a "particular, concrete injury" [*Sierra Club v. Morton*, 405 U.S. 727, 740-741 (1972)], or "a direct injury" [*Ex parte Levitt*, 302 U.S. 633, 634 (1937)], in short something more than "generalized grievances" [*Flast v. Cohen*, 392 U.S. 83, 106 (1968)]. — *United States v. Richardson*, at 180.

<sup>1</sup> E. Coke, *Institutes of the Laws of England* (1797).

<sup>2</sup> Frankfurter & Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 *Harv. L. Rev.* 1010 (1924). *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150-159 (1951, Frankfurter concurring).

<sup>3</sup> Jaffe, "Standing to Secure Judicial Review: Public Actions," 74 *Harv. L. Rev.* 1265 (1961) and "Standing to Secure Judicial Review: Private Actions," 75 *Harv. L. Rev.* 255 (1961).

<sup>4</sup> Bickel, "Foreward: The Passive Virtues, The Supreme Court, 1960 Term," 75 *Harv. L. Rev.* 40 (1961).

<sup>5</sup> R. Berger, "Standing to Sue in Public Actions: Is It a Constitutional Requirement?" 78 *Yale L. J.* 816 (1969).

<sup>6</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959).

<sup>7</sup> For example, the competitor standing created by the Congress in 402(b) of the Federal Communications Act of 1934 and accepted by the Supreme Court in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940), and *FCC v. NBC (KO)*, 319 U.S. 229, 246 (1943). See, Haimbaugh, "The TVA Cases: A Quarter Century Later," 41 *Indiana L.J.* 197, 201-204 (1966).

JUSTICES BRENNAN, WHITE, MARSHALL, POWELL & STEVENS WITH BLACKMUN  
CONCURRING IN QUOTED PORTIONS

[W]e conclude that appellant Whitener has established independently her claim to assert *jus tertii* standing. The operation of §§ 241 and 245 plainly have inflicted "injury in fact" upon appellant sufficiently to guarantee her "concrete adverseness," *Baker v. Carr*, 369 U.S. 186, 204 . . . (1962), and to satisfy the constitutionally based standing requirements imposed by Article III.—*Craig v. Boren*, 50 L. Ed. 2d 397, 405 (1976).

MR. JUSTICE STEWART

"Congress may not confer jurisdiction on Article III federal courts to render advisory opinions [or] to entertain 'friendly' suits [or] to resolve 'political questions' [because] suits of this character are inconsistent with the judicial function under Article III.—*Sierra Club v. Morton*, 405 U.S. 727 (1972).

"Standing is not to be denied simply because many people suffer the same injury."—*U.S. v. Richardson*, 418 U.S. 166, (1974) (dissenting opinion).

JUSTICE WHITE, CHIEF JUSTICE BURGER AND JUSTICE BRENNAN

The allegation here do not satisfy the threshold requirement of injury in fact or constituting a justiciable case or controversy . . . The alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing."—*United States v. S.C.R.A.P.*, 412 U.S. 669, 722-3 (1973), dissenting in part).

The procedure outlined in S. 555 also might be attacked on grounds of collusiveness as in *Muskrat v. United States*, 219 U.S. 346, 360 (1911) since the proceedings as in that case would be paid for out of "funds in the Treasury."

The strongest argument in favor of the constitutionality of the review required by S. 555 is that the Court would be performing not an Article III judicial function but an Article II, Section 2, clause 2 appointive function.<sup>8</sup>

The greatest weakness of the S. 555 procedure would be that it requires a judicial determination without parties necessary to furnish the requisite adverseness.

Similar but less serious doubts may be raised by a somewhat comparable provision in H.R. 2711:

"§ 591(k) Upon application of a majority of majority party members or a majority of all nonmajority party members of a judiciary committee of either House of the Congress, the United States District Court for the District of Columbia may issue any appropriate order (including an order in the nature of a writ of mandamus) commanding the Attorney General to comply with any provision of this chapter."

Unlike S. 555, the court here would be allowed discretion concerning whether to issue an order. Although there is a prescribed class of plaintiffs,<sup>9</sup> they may run into *Coleman v. Miller*<sup>10</sup> problems. An issue in that case was the standing of a majority of the Kansas Senate (plus three House members) to bring an action to compel that State's Secretary of State to erase an endorsement of the "Child Labor Amendment." Concurring Justices Frankfurter, Black, Roberts and Douglas believed that the legislators had no standing because they had no interest in the matter "apart from the interests that belong to the entire commonality of Kansas." But these legislators did not have the Congressional cachet which would be accorded by H.R. 2711. Which brings us back to the question of the extent to which Congress may or may not create standing for those who would not otherwise have it, or, in other words, create "private attorneys general" even—as here—of public officials.

<sup>8</sup> "... but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Due to the citation of *Katsenbach v. Morgan and Oregon v. Mitchell* in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), some see White's concurrence in that case as resting not only on what Douglas called the broadest definition of standing possible under Article III, but also on § 5 of the XIVth Amendment Gunther, *Constitutional Law* 9th Ed. 1572 (1975). Some reliance might also be placed in a broad analogy to the language in *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932).

<sup>9</sup> For a somewhat analogous provision in the French Constitution for a similar class of possible plaintiffs, see Halmbaugh, "Was it France's *Marbury v. Madison*?" 35 *Ohio State L. J.* 910, 917-21 (1974).

<sup>10</sup> 307 U.S. 433, 454-455 (1939).

The strongest support for the constitutionality of 591(k) may be found in the case of *Nader v. Bork*<sup>11</sup> in which standing to challenge the removal of Special Prosecutor Archibald Cox was granted to three members of Congress by District Judge Gesell who stated that "the discharge of Mr. Cox precipitated a widespread concern, if not lack of confidence, in the administration of justice. Numerous bills are pending in the Senate and House of Representatives which attempt to insulate the Watergate inquiries and prosecutions from Executive interference, and impeachment of the President because of his alleged role in the Watergate matter—including the firing of Mr. Cox—is under active consideration. Given these unusual circumstances, the standing of the three congressional plaintiffs to pursue their effort to obtain a judicial determination as to the legality of the Cox discharge falls squarely within the recent holding of the United States Court of Appeals for the District of Columbia Circuit in *Mitchell v. Laird*, No. 71-1510 (D.C. Cir. March 20, 1973) [32 Ad.L.2d 433]."<sup>12</sup>

Finally, it should be remembered that in judging either bill, it would be possible for the Court to blink the standing issue as it did, for example, in *Adler v. Board of Education*.<sup>13</sup> The chances for such an outcome might be enhanced in times when the significant requisite number of Judiciary Committee members join to trigger a special prosecutor mechanism.

Very truly yours,

GEORGE D. HAIMBAUGH,  
Professor of Law.

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CONGRESS OF THE UNITED STATES,  
COMMITTEE ON THE JUDICIARY,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., May 25, 1977.

Professor ROGER GOLDMAN,  
St. Louis University School of Law,  
3642 Lindell Blvd., St. Louis, Mo.

DEAR PROFESSOR GOLDMAN: I am informed by Subcommittee Counsel that you have agreed to examine some of the constitutional questions raised by H.R. 2835 and H.R. 2711, special prosecutor legislation. I am sure your analysis of the standing, case or controversy and separation of powers issues presented in these measures will be very beneficial to the Subcommittee as we continue our work on this legislation. Your efforts on behalf of the subcommittee are greatly appreciated, and we will include your comments in our final hearing record.

I am advised that Bob Lembo, Counsel to the Subcommittee, has spoken with you about this project and is sending you the materials necessary to direct your research efforts. If you need any additional materials or assistance please contact Mr. Lembo at (202) 225-0406.

Kind regards,  
Sincerely,

JAMES R. MANN,  
Chairman, Subcommittee on Criminal Justice.

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SAINT LOUIS UNIVERSITY,  
Saint Louis, Mo., August 12, 1977.

HON. JAMES R. MANN,  
Chairman, Subcommittee on Criminal Justice,  
Washington, D.C.

DEAR CONGRESSMAN MANN: I am pleased to give you my views on the special prosecutor bills, H.R. 2711 and Title I of S. 555, particularly as to the constitutionality of those sections which authorize judicial review of actions taken by the Attorney General with respect to his application for the appointment of the special prosecutor.

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<sup>11</sup> 33 Ad. L. 2d 929 (D.D.C. 1973).

<sup>12</sup> In that case standing to challenge the constitutionality of the Indo-China War was granted to a group of Congressmen by the United States District Court of Appeals for the District of Columbia which stated that, "If we, for the moment, assume that defendants' actions in continuing the hostilities in Indo-China were or are beyond the authority conferred upon them by the Constitution, a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, such as raising an army or enacting other civil or criminal legislation. In our view, these considerations are sufficient to give plaintiffs a standing to make their complaint. . . ."

<sup>13</sup> 342 U.S. 485 (1952). See dissenting opinion of Mr. Justice Frankfurter. *Id.* at 504.

## I. COMPARISON OF H.R. 2711 AND S. 555

Both bills utilize judicial selection of the special prosecutor by a special panel of judges upon application of the Attorney General. However, the bills differ in the triggering mechanisms for judicial review of the Attorney General's actions.

Section 591(k) of the House Bill authorizes the judiciary committees of either House, upon application of sufficient numbers of committee members, to seek an order in the United States District Court for the District of Columbia commanding the Attorney General to comply with the provisions of the chapter. Most commonly, the application would be made when the Attorney General found the matter under investigation to be unsubstantiated under § 591(a) or that no conflict of interest existed under § 591(f). Less likely, though permissible under the bill, would be an application to command the Attorney General to refrain from seeking the appointment of a special prosecutor because the committee members felt the matter was unsubstantiated or no conflict existed. Other examples of grounds for applying to the district court include the Attorney General refusing to conduct an investigation because information received under § 591(a) was not "specific"; filing an incomplete memorandum with the special panel that a matter is unsubstantiated (§ 591(c)); refusing to apply for a special prosecutor when 60 days have elapsed under § 591(e); and failing to notify the judiciary committees in writing that he has not made an application for a special prosecutor upon their request (§ 591(j)).

The various examples mentioned above obviously differ in terms of the range of discretion vested by H.R. 2711 in the Attorney General.

Section 592(e) (3)C of Title I of S. 555, passed by the Senate on June 27, 1977, authorizes the special panel of the court to review, *sua sponte*, the decision of the Attorney General not to seek appointment of a special prosecutor because he finds no conflict or appearance of a conflict exists under § 592(e) (1). The court may request all materials necessary to make a decision on whether a conflict or the appearance of a conflict exists, and can appoint a special prosecutor if the court finds that it does.

The differences between the approaches of the two bills are:

|                                       | H.R. 2711   | S. 555   |
|---------------------------------------|---|--|
| Who initiates the review process..... | Members of Congress.....                              | Special panel.   |
| What is reviewed by the court.....    | All duties of the Attorney General under the chapter. | The Attorney General's decision that no conflict exists. |
| Court relief.....                     | Order to Attorney General to comply with act.         | Appointment of special prosecutor.                       |
| Reviewing court.....                  | Federal district court, District of Columbia.         | Special panel.   |

## II. CONSTITUTIONAL QUESTIONS RAISED BY SECTION 519(k), H.R. 2711

(A) *Standing*

The majority of the majority party members or the majority of all non-majority party members of either congressional judiciary committee is granted standing to command the Attorney General to comply with the chapter. As Professor Archibald Cox put it in recommending this kind of enforcement provision in the bill, not every citizen ought to be able to bring a criminal investigation into public view by litigation. Yet even though Congress has great power to grant standing, there are still Article III limitations on how far Congress can go.

Most importantly, persons seeking judicial relief in an Article III court must have suffered injury-in-fact. Cases involving standing or legislators have required an infringement on a member's voting power (*Coleman v. Miller*, 307 U.S. 433 (1939) (state legislature); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir., 1974)), ability to participate in legislative debate (*Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir., 1973) (dicta)), or duties in impeachment proceedings (*Mitchell v. Laird*, 488 F.2d 611 (D.C., 1973).) Some Courts of Appeals have found injury to more generalized duties of congressmen to be sufficient (*Mitchell v. Laird*, *supra*) while others have required more particularized injury as otherwise no limits could be set (*Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir., 1975); *Holtzman v. Schlesinger*, *supra*). Although the above cases, unlike § 591(k), did not involve specific grants of standing by Congress, the trend of the Supreme

Court suggests that the more limited view of standing adopted by the Second and Fourth Circuits would be followed. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Organization, Inc.* 426 U.S. 26 (1976).

The *Welfare Rights* case also emphasized an additional Article III standing requirement that the relief sought from the court must remedy the injury. The injury must be connected to the challenged actions by more than "speculative inferences." Assuming the injury incurred by the Attorney General's failure to proceed is that a potentially guilty person is not prosecuted and convicted, the relief granted by the court must remedy that wrong. Since the special prosecutor, when appointed, might find the matter unsubstantiated or drop the prosecution at some later stage, the remedy under § 591(k) of ordering the Attorney General to proceed may not relieve the injury.

#### (B) Separation of Powers

The committee has heard much testimony whether judicial appointment of the special prosecutor violates the doctrine of separation of powers. I will address the related question, assuming the constitutionality of judicial appointment, can a court review executive action preliminarily to the appointment?

The Supreme Court near the end of the last term articulated a test for determining whether a separation of powers problem existed:

"[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services*, 97 S.Ct. 2777, 2790 (1977).

The Court also pointed out that claims of interference with one branch by another are less viable where one branch has expressed its agreement with the other: "[T]he fact that neither President Ford nor President Carter supports appellant's (Nixon's) claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch." *Nixon, supra* at 2793. Thus, to the extent the executive branch supports H.R. 2711, the less force is the argument that the bill works an unconstitutional interference with that branch.

The question raised by § 591(k) is whether that section involves intrusion upon prosecutorial discretion, or whether it is concerned solely with ministerial functions of the Attorney General. Several witnesses during earlier consideration of the special prosecutor bills pointed out the concern of court interference with that discretion. William B. Spann, Jr., testifying before this committee on H.R. 14476, noted that, "The court would have no power to review discretionary prosecutorial decisions as to the merits of a particular case, whether or not it is frivolous or what tactics should be pursued in an investigation or prosecution. The courts, of course, cannot interfere with prosecutorial discretion."

When the Attorney General makes the decision that a given matter is unsubstantiated, he is in effect deciding not to prosecute. Yet under Sec. 591(k), the district court may be asked to find that decision incorrect and, in effect, reverse the Attorney General's decision not to proceed with the prosecution. If that reading of § 591(k) is correct, the court would apparently be able to review the Attorney General's raw files in order to determine whether he complied with the chapter. Such review works a serious intrusion into areas traditionally left to the prosecutor's discretion. The Senate, perhaps in recognition of this problem, made the Attorney General's decision not to proceed because of insubstantiality final, subject only to filing a report of that finding with the court, § 592(b)1. The committee might want to consider adopting its former position, quite similar to the current Senate approach, in H.R. 14476, § 594(d) (1).

#### III CONSTITUTIONAL QUESTIONS RAISED BY § 593(e) (3), S. 555

The approach of S. 555 to reviewing actions of the Attorney General with respect to his application for a special prosecutor, like the earlier house version of H.R. 14476, takes the judicial function outside an Article III case by relating the review to the court's Article II appointment power. Separation of powers problems remain, though to a lesser extent than under H.R. 2711. Review is limited to the situation where the Attorney General might not be able to exercise

1 of interest, or the appearance thereof. Such rules and regula-  
2 tions may provide that a willful violation of any provision  
3 thereof shall result in removal from office.”.

4 (b) The table of sections for chapter 31 of title 28 of  
5 the United States Code is amended by adding at the end the  
6 following:

“528. Disqualification of officers and employees of the Department of  
Justice.”.

**Mr. Hyde introduced the following bill; which was referred to the Committee on the Judiciary**

# A BILL

To amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

## SHORT TITLE

SECTION 1. This Act may be cited as the "Special  
Prosecutor Act".

**SPECIAL PROSECUTOR**

7 SEC. 2. (a) Title 28 of the United States Code is  
8 amended by inserting immediately after chapter 37 the fol-  
9 lowing new chapter:

1                                    **SPECIAL PROSECUTOR**

2        SEC. 2. (a) Title 28 of the United States Code is  
 3 amended by inserting immediately after chapter 37 the  
 4 following new chapter:

5                    **"Chapter 39—SPECIAL PROSECUTOR**

"Sec.

"591. Appointment.

"592. Prosecutorial jurisdiction; authority.

"593. Removal or termination.

"594. Final report; congressional oversight.

"595. Presentations by Attorney General and Solicitor General.

"596. Special panel of the court.

"597. Termination of effect of chapter.

6        **"§ 591. Appointment**

7        "(a) Upon receiving any specific information that any  
 8 of the persons described in subsection (b) of this section  
 9 has—

10        "(1) knowingly authorized or engaged in any Fed-  
 11 eral criminal act or omission involving the abuse of  
 12 Federal office;

13        "(2) knowingly authorized or engaged in any act  
 14 or omission constituting a violation of any Federal  
 15 criminal law regulating the financing or conduct of elec-  
 16 tions or election campaigns; or

17        "(3) violated any Federal criminal law relating to  
 18 the obstruction of justice or perjury, or conspired to  
 19 violate any such Federal criminal law or to defraud the  
 20 United States;

1 the Attorney General shall conduct, for a period not to  
2 exceed sixty days, such preliminary investigation as the  
3 Attorney General deems appropriate to ascertain whether  
4 the matter under investigation is so unsubstantiated that no  
5 further investigation or prosecution is warranted.

6 “(b) The persons referred to in subsection (a) of this  
7 section are as follows:

8 “(1) The President or Vice President.

9 “(2) Any individual serving in a position compen-  
10 sated at level I of the Executive Schedule under section  
11 5312 of title 5 of the United States Code.

12 “(3) Any individual working in the Executive  
13 Office of the President and compensated at a rate not  
14 less than the rate provided for level IV of the Executive  
15 Schedule under section 5315 of title 5 of the United  
16 States Code.

17 “(4) The Director of the Federal Bureau of In-  
18 vestigation or the Director of Central Intelligence.

19 “(5) Any individual who held any office or position  
20 described in any of paragraphs (1) through (4) of this  
21 subsection during the incumbency of the President or  
22 during the period the last preceding President held  
23 office, if such preceding President was of the same  
24 political party as the incumbent President.

1           “(6) A national campaign manager or chairman of  
2           any national campaign committee seeking the election  
3           or reelection of the President.

4           “(7) A Member of Congress (including a Delegate  
5           to the House of Representatives or Resident Commis-  
6           sioner in the House of Representatives).

7           “(c) If the Attorney General finds the matter subject  
8           to preliminary investigation in accordance with subsection  
9           (a) of this section is so unsubstantiated that no further  
10          investigation or prosecution is warranted, the Attorney  
11          General shall file a memorandum with the special panel of  
12          the court. Such memorandum shall contain a summary of  
13          the information received and the results of any preliminary  
14          investigation.

15          “(d) If, after the filing of a memorandum under sub-  
16          section (c) of this section, the Attorney General receives  
17          additional specific information about the matter to which  
18          such memorandum related, which information, in the judg-  
19          ment of the Attorney General, warrants further investigation  
20          or prosecution, the Attorney General shall, not later than  
21          thirty days after receiving such additional information, apply  
22          to the special panel of the court for the appointment of  
23          a special prosecutor.

24          “(e) If the Attorney General finds the matter subject  
25          to preliminary investigation in accordance with subsection

1 (a) of this section warrants further investigation or prosecu-  
2 tion, or if sixty days elapse from the receipt of the informa-  
3 tion and the Attorney General has not yet determined that  
4 the matter is so unsubstantiated that the matter does not  
5 warrant further investigation, then the Attorney General  
6 shall apply to the special panel of the court for the appoint-  
7 ment of a special prosecutor.

8 “(f) If, in the course of any Federal criminal investiga-  
9 tion, the Attorney General determines that the continuation  
10 of the investigation or of a resulting prosecution or the out-  
11 come of such investigation or prosecution may so directly and  
12 substantially affect the political interests of the President, of  
13 the President’s political party, or of the Attorney General as  
14 to make it inappropriate in the interest of the administration  
15 of justice for the Department of Justice to conduct such inves-  
16 tigation, then the Attorney General shall apply to the special  
17 panel of the court for the appointment of a special prosecutor.

18 “(g) Any memorandum or application filed under this  
19 section with the special panel of the court shall not be re-  
20 vealed to any third party without leave of the court. In the  
21 case of any such application, the application shall contain  
22 sufficient information to assist the special panel of the court  
23 to select a special prosecutor and to define that special prose-  
24 cutor’s prosecutorial jurisdiction.

1       “(h) Upon the receipt of an application under this sec-  
2 tion, the special panel of the court shall appoint an appropri-  
3 ate special prosecutor and shall inform the Attorney General  
4 and the Congress of, and make public, the name of such  
5 special prosecutor.

6       “(i) The Attorney General may request that the court  
7 assign new matters to an existing special prosecutor or that  
8 the prosecutorial jurisdiction of such a special prosecutor  
9 be expanded, and the special panel of the court may make  
10 appropriate orders for such assignment or expansion. A  
11 special prosecutor may accept a referral of a matter by the  
12 Attorney General, if the matter relates to a matter within  
13 the prosecutorial jurisdiction established by the special panel  
14 of the court.

15       “(j) A judiciary committee of either House of the  
16 Congress may request that the Attorney General apply for  
17 the appointment of a special prosecutor under this section.  
18 Not later than thirty days after the receipt of such a request,  
19 the Attorney General shall notify the committee making the  
20 request in writing of any action the Attorney General has  
21 taken under this section, and, if no application has been made  
22 to the special panel of the court under this section, why such  
23 application was not made. Such written notification shall not  
24 be revealed to any third party except that the committee  
25 may, either on its own initiative or upon the request of the

1 Attorney General, make public such portion or portions of  
2 such notification as will not in the committee's judgment  
3 prejudice the rights of any individual.

4 “(k) Upon application of a majority of majority party  
5 members or a majority of all non-majority-party members  
6 of a judiciary committee of either House of the Congress, the  
7 United States District Court for the District of Columbia  
8 may issue any appropriate order (including an order in the  
9 nature of a writ of mandamus) commanding the Attorney  
10 General to comply with any provision of this chapter.

11 “(l) (1) The Attorney General shall upon the date of  
12 the enactment of this subsection conduct, for a period not to  
13 exceed ninety days, a preliminary investigation into whether  
14 there has been since 1970 improper or illegal conduct on the  
15 part of any Representative or Senator in the Congress of the  
16 United States with respect to the receipt or acceptance of any  
17 valuable consideration from representatives of any foreign  
18 government in order to influence legislation or other govern-  
19 ment action.

20 “(2) The Attorney General, upon the completion of the  
21 ninety-day period referred to in paragraph (1) of this sub-  
22 section, shall make such findings and take such actions under  
23 this section (including, if appropriate, applying for the ap-  
24 pointment of a special prosecutor) with respect to such in-  
25 vestigation as the Attorney General would be required by

1 this section to take with respect to a preliminary investigation  
2 undertaken in accordance with subsection (a) of this section.

3 **“§ 592. Prosecutorial jurisdiction; authority**

4 “(a) Notwithstanding any other provision of law, a  
5 special prosecutor appointed under this chapter shall  
6 have, with respect to all matters in such special prosecu-  
7 tor’s prosecutorial jurisdiction established under this chapter  
8 all the investigative and prosecutorial functions and powers  
9 of the Department of Justice, the Attorney General, and any  
10 other officer or employee of the Department of Justice.

11 “(b) A special prosecutor appointed under this chapter  
12 shall receive compensation at a per diem rate equal to the  
13 rate of basic pay for level IV of the Executive Schedule  
14 under section 5315 of title 5 of the United States Code. For  
15 the purposes of carrying out the duties of the office of  
16 special prosecutor, such special prosecutor shall have power  
17 to appoint, fix the compensation, and assign the duties of  
18 such employees as such special prosecutor deems necessary  
19 (including investigators, attorneys, and part-time consult-  
20 ants). The positions of all such employees are exempted  
21 from the competitive service. No such employee may be  
22 compensated at a rate exceeding the maximum rate provided  
23 for GS-18 of the General Schedule under section 5332 of title  
24 5 of the United States Code.

25 “(c) A special prosecutor appointed under this chapter

1 may make public from time to time and shall send to the  
2 Congress at least annually such statements or reports as  
3 such special prosecutor deems appropriate.

4 “(d) There are authorized to be appropriated for each  
5 fiscal year such sums as may be necessary, to be held by  
6 the Department of Justice as a contingent fund for the use  
7 of any special prosecutors in the carrying out of this chapter.

8 **“§ 593. Removal or termination**

9 “(a) A special prosecutor appointed under this chapter  
10 may be removed from office, other than by impeachment and  
11 conviction, only by the special panel of the court and only  
12 for extraordinary impropriety, or such incapacitation or other  
13 condition as substantially impairs the performance of such  
14 special prosecutor's duties.

15 “(b) The office of a special prosecutor shall terminate  
16 upon the submission by such special prosecutor of notifica-  
17 tion to the Attorney General that the investigation of all  
18 matters within the prosecutorial jurisdiction of such special  
19 prosecutor, and any resulting prosecutions, have been com-  
20 pleted or so substantially completed that it would be appro-  
21 priate for the Department of Justice to complete such mat-  
22 ters. No such submission shall be effective to terminate such  
23 office until after the completion and filing of the report re-  
24 quired under section 594 of this title.

1       “(c) The special panel of the court may, either on  
2 such panel’s own motion or upon suggestion of the Attorney  
3 General, terminate the office of special prosecutor at any  
4 time, on the grounds that the investigation of all matters  
5 within the prosecutorial jurisdiction of the special prosecutor,  
6 and any resulting prosecutions, have been completed or so  
7 substantially completed that it would be appropriate for the  
8 Department of Justice to complete such matters.

9       **“§ 594. Final report; congressional oversight**

10       “(a) (1) In addition to any reports made under section  
11 592 of this title, a special prosecutor appointed under this  
12 chapter shall, at the conclusion of such special prosecutor’s  
13 duties, submit to the special panel of the court a report under  
14 this section.

15       “(2) A report under this section shall set forth fully  
16 and completely a description of the work of the special prose-  
17 cutor, including the disposition of all cases brought, and the  
18 reasons for not prosecuting any matter within the prose-  
19 cutorial jurisdiction of such special prosecutor which was not  
20 prosecuted. The report shall be in sufficient detail to allow  
21 determination of whether the special prosecutor’s investiga-  
22 tion was thoroughly and fairly completed.

23       “(3) The special panel of the court may release to the  
24 Congress, the public, or to any appropriate person, such  
25 portion of a report made under this section as the special

1 panel deems appropriate. The special panel of the court shall  
2 make such orders as are appropriate to protect the rights  
3 of any individual named in such report and prevent undue  
4 interference with any pending prosecution. The special panel  
5 of the court may make any portion of a report under this  
6 section available to any individual named in such report for  
7 the purposes of receiving within a time limit set by the spe-  
8 cial panel any comments or factual information that such in-  
9 dividual may submit. Such comments and factual informa-  
10 tion, in whole or in part, may in the discretion of such  
11 special panel be included as an appendix to such report.

12 “(4) A special prosecutor, where appropriate, shall  
13 promptly advise the chairman and ranking minority member  
14 of the House committee having jurisdiction over impeach-  
15 ments of any substantial and credible information which such  
16 special prosecutor receives that may constitute grounds for  
17 an impeachment. Nothing in this chapter shall prevent the  
18 Congress or either House thereof from obtaining information  
19 in the course of an impeachment proceeding.

20 “(b) The appropriate committees of the Congress shall  
21 have oversight jurisdiction with respect to the official con-  
22 duct of any special prosecutor appointed under this chapter,  
23 and such special prosecutor shall have the duty to cooperate  
24 with the exercise of such oversight jurisdiction.

1 **“§ 595. Presentations by Attorney General and Solicitor**

2 **General**

3 “Nothing in this chapter shall prevent the making by  
4 the Attorney General or the Solicitor General of a presen-  
5 tation to any court as to issues of law raised by any case  
6 or appeal.

7 **“§ 596. Special panel of the court**

8 “The special panel of the court to which functions are  
9 given by this chapter is the division established under section  
10 49 of this title.

11 **“§ 597. Termination of effect of chapter**

12 “This chapter shall cease to have effect five years after  
13 the date on which it takes effect, except as to the completion  
14 of then-pending matters, which in the judgment of the special  
15 panel of the court requires its continuance in effect, with  
16 respect to which matters it shall continue in effect until such  
17 special panel determines that such matters have been  
18 completed.”.

19 (b) The tables of chapters for title 28 of the United  
20 States Code and for part II of such title 28 are each  
21 amended by inserting immediately after the item relating  
22 to chapter 37 the following new item:

“39. Special prosecutor.”

3 SEC. 3. (a) Chapter 3 of title 28 of the United States  
4 Code is amended by adding at the end the following new  
5 section:

8       “(a) Beginning with the two-year period commencing  
9 on the date this section takes effect, the chief judge of the  
10 United States Court of Appeals for the District of Columbia  
11 shall assign three persons who are judges or justices for  
12 each successive two-year period to a division of the United  
13 States Court of Appeals for the District of Columbia to be  
14 the special panel of the court for the purposes of chapter 39  
15 of this title.

20       “(c) In assigning judges or justices to sit on the divi-  
21 sion established in subsection (a) of this section, priority  
22 shall be given to senior retired circuit judges and senior  
23 retired justices.

1       “(d) The chief judge of the United States Court of  
2 Appeals for the District of Columbia may make a request  
3 to the Chief Justice of the United States, without presenting  
4 a certificate of necessity, to designate and assign, in accord-  
5 ance with section 294 of this title, retired circuit court judges  
6 of another circuit or retired justices to the division established  
7 under subsection (a) of this section.

8       “(e) Any vacancy in the division established under  
9 subsection (a) of this section shall be filled only for the  
10 remainder of the two-year period in which such vacancy  
11 occurs and in the same manner as initial assignments to the  
12 division were made.

13       “(f) No judge or justice who as a member of the di-  
14 vision established in subsection (a) of this section partici-  
15 pated in a function conferred on the division under chapter  
16 39 of this title involving a special prosecutor shall be eligible  
17 to participate in any judicial proceeding involving a matter  
18 which involves such special prosecutor while such special  
19 prosecutor is serving in that office or which involves the  
20 exercise of such special prosecutors’ official duties, regardless  
21 of whether such special prosecutor is still serving in that  
22 office.”.

23       (b) The table of sections for chapter 3 of title 28 of  
24 the United States Code is amended by adding at the end  
25 the following item:

“49. Assignment of judges to division to appoint special prosecutors.”.

1 DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE  
2 DEPARTMENT OF JUSTICE

3 SEC. 4. (a) Chapter 31 of title 28 of the United States  
4 Code is amended by adding at the end the following:

5 **"§ 528. Disqualification of officers and employees of the**  
6 **Department of Justice**

7 "The Attorney General shall promulgate rules and regu-  
8 lations which require any officer or employee of the Depart-  
9 ment of Justice, including a United States attorney or a  
10 member of his staff, to disqualify himself from participation  
11 in a particular investigation or prosecution if such partici-  
12 pation may result in a personal, financial, or political conflict  
13 of interest, or the appearance thereof. Such rules and regula-  
14 tions may provide that a willful violation of any provision  
15 thereof shall result in removal from office."

16 (b) The table of sections for chapter 31 of title 28 of  
17 the United States Code is amended by adding at the end the  
18 following:

"528. Disqualification of officers and employees of the Department of  
Justice."

95TH CONGRESS  
1ST SESSION

# H. R. 8412

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## IN THE HOUSE OF REPRESENTATIVES

JULY 19, 1977

Mr. EVANS of Delaware introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To require the President to appoint a Special Prosecutor to investigate and prosecute acts by agents of foreign governments to influence elected and nonelected officials and employees of the United States.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Congressional Integrity  
4       Act of 1977".

5       SEC. 2. The President shall, within thirty days of enact-  
6       ment of this Act, cause to be appointed a special prosecutor  
7       to serve in the Department of Justice.

8       SEC. 3. The Special Prosecutor shall investigate, prepare,  
9       and conduct prosecutions with respect to acts by agents of

1 foreign governments designed to buy influence for such gov-  
2 ernments from elected officials and employees of the United  
3 States by providing to such officials and employees money,  
4 gifts, free trips, and other matters of value.

5 SEC. 4. (a) Notwithstanding any other provision of law,  
6 a Special Prosecutor appointed under this Act shall have,  
7 with respect to all matters in such Special Prosecutor's prose-  
8 cutorial jurisdiction established under this Act, full power,  
9 and independent authority—

10 (1) to conduct proceedings before grand juries and  
11 other investigations;

12 (2) to participate in court proceedings and engage  
13 in any litigation, including civil and criminal matters, as  
14 he deems necessary;

15 (3) to appeal any decision of a court in any case  
16 or proceeding in which such Special Prosecutor partici-  
17 pates in an official capacity;

18 (4) to review all documentary evidence available  
19 from any source;

20 (5) to determine whether to contest the assertion  
21 of any testimonial privilege;

22 (6) to receive appropriate national security clear-  
23 ances and, if necessary, contest in court, including, where  
24 appropriate, participation in in camera proceedings, any

1 claim of privilege or attempt to withhold evidence on  
2 grounds of national security;

3 (7) to make applications to any Federal court for  
4 a grant of immunity to any witness, consistent with ap-  
5 plicable statutory requirements, or for warrants, sub-  
6 penas, or other court orders, and, for purposes of sections  
7 6003, 6004, and 6005 of title 18, a special prosecutor  
8 may exercise the authority vested in a United States at-  
9 torney or the Attorney General;

10 (8) to inspect, obtain, or use the original or a copy  
11 of any tax return, in accordance with the applicable stat-  
12 utes and regulations, and for purposes of section 6103  
13 of title 26, and the regulations issued thereunder, a spe-  
14 cial prosecutor may exercise the powers vested in a  
15 United States attorney or the Attorney General;

16 (9) to initiate and conduct prosecutions in any  
17 court of competent jurisdiction, frame and sign indict-  
18 ments, file informations, and handle all aspects of any  
19 case in the name of the United States; and

20 (10) to exercise all other investigative and prosecu-  
21 torial functions and powers of the Department of Justice,  
22 the Attorney General, and any other officer or employee  
23 of the Department of Justice, except that the Attorney  
24 General shall exercise direction or control as to those

1 matters that specifically require the Attorney General's  
2 personal action under section 2516 of title 18.

3 (b) A Special Prosecutor appointed under this chapter  
4 shall receive compensation at a per diem rate equal to the  
5 rate of basic pay for level IV of the Executive Schedule  
6 under section 5315 of title 5.

7 (c) For the purposes of carrying out the duties of  
8 the office of Special Prosecutor, a Special Prosecutor shall  
9 have power to appoint, fix the compensation, and assign the  
10 duties of such employees as such Special Prosecutor deems  
11 necessary (including investigators, attorneys, and part-time  
12 consultants). The positions of all such employees are ex-  
13 empted from the competitive service. No such employee may  
14 be compensated at a rate exceeding the maximum rate pro-  
15 vided for GS-18 of the General Schedule under section 5332  
16 of title 5.

17 (d) If requested by a Special Prosecutor, the Depart-  
18 ment of Justice shall provide to such Special Prosecutor  
19 assistance which shall include full access to any records, files,  
20 or other materials relevant to matters within his prosecutorial  
21 jurisdiction, and providing to such Special Prosecutor the re-  
22 sources and personnel required to perform such special pros-  
23 ecutor's duties.

24 (e) A Special Prosecutor may ask the Attorney General  
25 or the division of the court to refer matters related to the

1 Special Prosecutor's prosecutorial jurisdiction. A special pros-  
2 ecutor may accept referral of a matter by the Attorney Gen-  
3 eral, if the matter relates to a matter within such special  
4 prosecutor's prosecutorial jurisdiction as established by the  
5 division of the court. If such a referral is accepted, the Special  
6 Prosecutor shall notify the division of the court.

7 (f) To the maximum extent practicable, a special pros-  
8 ecutor shall comply with the written policies of the Depart-  
9 ment of Justice respecting enforcement of the criminal laws  
10 which have been promulgated prior to the special prose-  
11 cutor's appointment.

12 SEC. 5. There are authorized to be appropriated such  
13 sums as may be necessary to carry out the provisions of this  
14 Act.



1     **"Chapter 38—IMPROPER FOREIGN INFLUENCE**  
 2                     **SPECIAL PROSECUTOR**

"Sec.

"581. Appointment.

"582. General prosecutorial jurisdiction; authority.

"583. Scope of mandated investigation.

"584. Removal or termination.

"585. Final report; congressional oversight.

"586. Presentations by Attorney General and Solicitor General.

"587. Special panel of the court.

"588. Effective date, termination of effect of chapter.

3     **"§ 581. Appointment**

4             "The Attorney General shall, within fifteen days of the  
 5 effective date of this Act, apply to the special panel of the  
 6 court for the appointment of a special prosecutor to act pur-  
 7 suant to the provisions of this Act.

8     **"§ 582. General prosecutorial jurisdiction; authority**

9             "(a) Notwithstanding any other provision of law, the  
 10 special prosecutor appointed under this chapter shall have,  
 11 with respect to all matters in such special prosecutor's  
 12 prosecutorial jurisdiction established under this chapter all  
 13 the investigative and prosecutorial functions and powers of  
 14 the Department of Justice, the Attorney General, and any  
 15 other officer or employee of the Department of Justice.

16            "(b) The special prosecutor appointed under this chap-  
 17 ter shall receive compensation at a per diem rate equal to the  
 18 rate of basic pay for level IV of the Executive Schedule  
 19 under section 5315 of title 5 of the United States Code. For  
 20 the purposes of carrying out the duties of the office of

1 special prosecutor, such special prosecutor shall have power  
 2 to appoint, fix the compensation, and assign the duties of  
 3 such employees as such special prosecutor deems necessary  
 4 (including investigators, attorneys, and part-time consult-  
 5 ants). The positions of all such employees are exempted  
 6 from the competitive service. No such employee may be  
 7 compensated at a rate exceeding the maximum rate provided  
 8 for GS-18 of the General Schedule under section 5332 of  
 9 title 5 of the United States Code.

10 “(c) The special prosecutor appointed under this chap-  
 11 ter may make public from time to time and shall send to  
 12 the Congress at least annually such statements or reports as  
 13 such special prosecutor deems appropriate.

14 “(d) There are authorized to be appropriated for each  
 15 fiscal year such sums as may be necessary, to be held by  
 16 the Department of Justice as a contingent fund for the use  
 17 of any special prosecutors in the carrying out of this chapter.

18 **“§ 583. Scope of mandated investigation**

19 “(a) The special prosecutor is charged with investigat-  
 20 ing substantive allegations that any of the persons described  
 21 in subsection (b) of this section has—

22 “(1) knowingly authorized or engaged in any Fed-  
 23 eral criminal act or omission involving Federal office;

24 “(2) knowingly authorized or engaged in any act  
 25 or omission constituting a violation of any Federal crim-

1       inal law regulating finance or conduct of elections or  
2       election campaigns; or

3               “(3) violated any Federal criminal law relating to  
4       the obstruction of justice or perjury, or conspired to vio-  
5       late any such Federal criminal law or to defraud the  
6       United States;

7       where such action, omission, or authorization relates to an  
8       attempt by a foreign government or a foreign national, or an  
9       agent of either, to influence the operation of the Government  
10      of the United States. Such investigation shall include but  
11      not be limited to an investigation of the activities of the  
12      Government of the Republic of Korea, its nationals and  
13      agents.

14       “(b) The persons referred to in subsection (a) of this  
15      section are as follows:

16               “(1) any elected official of the Federal Govern-  
17      ment;

18               “(2) any appointed official of the Federal Govern-  
19      ment;

20               “(3) any employee of the Federal Government;

21               “(4) any individual who held any office or position  
22      described in any of paragraphs (1) through (3) of this  
23      subsection at any time, unless—

24               “(A) such individual is immune from prosecu-

1           tion as a result of the applicable statute of limita-  
2           tions, and

3           “(B) an investigation of such individual would  
4           not contribute significantly to other ongoing investi-  
5           gations in the opinion of the special prosecutor;

6           “(5) any individual who, even though not an  
7           elected official, appointee, or employee of the Federal  
8           Government, the prosecutor has reason to believe has  
9           engaged in a conspiracy with an individual or individuals  
10          included in paragraphs (1) through (4) where such  
11          conspiracy is within the scope of subsection (a) of this  
12          section.

13       **“§ 584. Removal or termination**

14          “(a) The special prosecutor appointed under this chap-  
15          ter may be removed from office, other than by impeachment  
16          and conviction, only by the special panel of the court and  
17          only for extraordinary impropriety, or such incapacitation or  
18          other condition as substantially impairs the performance of  
19          such special prosecutor’s duties.

20          “(b) The office of the special prosecutor shall terminate  
21          upon the submission by such special prosecutor of notifica-  
22          tion to the Attorney General that the investigation of all  
23          matters within the prosecutorial jurisdiction of such special  
24          prosecutor, and any resulting prosecutions, have been com-

1 pleted or so substantially completed that it would be appro-  
2 priate for the Department of Justice to complete such mat-  
3 ters. No such submission shall be effective to terminate such  
4 office until after the completion and filing of the report re-  
5 quired under section 585 of this title.

6 **"§ 585. Final report; congressional oversight**

7 " (a) (1) In addition to any reports made under section  
8 582 of this title the special prosecutor appointed under this  
9 chapter shall, at the conclusion of such special prosecutor's  
10 duties, submit to the special panel of the court a report under  
11 this section.

12 " (2) A report under this section shall set forth fully  
13 and completely a description of the work of the special prose-  
14 cutor, including the disposition of all cases brought, and the  
15 reasons for not prosecuting any matter within the prose-  
16 cutorial jurisdiction of such special prosecutor which was not  
17 prosecuted. The report shall be in sufficient detail to allow  
18 determination of whether the special prosecutor's investiga-  
19 tion was thoroughly and fairly completed.

20 " (3) The special panel of the court may release to the  
21 Congress, the public, or to any appropriate person, such  
22 portion of a report made under this section as the special  
23 panel deems appropriate. The special panel of the court shall  
24 make such orders as are appropriate to protect the rights  
25 of any individual named in such report and prevent undue

1 interference with any pending prosecution. The special panel  
 2 of the court may make any portion of a report under this  
 3 section available to any individual named in such report for  
 4 the purposes of receiving within a time limit set by the spe-  
 5 cial panel any comments or factual information that such in-  
 6 dividual may submit. Such comments and factual informa-  
 7 tion, in whole or in part, may in the discretion of such  
 8 special panel be included as an appendix to such report.

9       “(4) The special prosecutor, where appropriate, shall  
 10 promptly advise the chairman and ranking minority member  
 11 of the House committee having jurisdiction over impeach-  
 12 ments of any substantial and credible information which such  
 13 special prosecutor receives that may constitute grounds for  
 14 an impeachment. Nothing in this chapter shall prevent the  
 15 Congress or either House thereof from obtaining information  
 16 in the course of an impeachment proceeding.

17       “(b) The appropriate committees of the Congress shall  
 18 have oversight jurisdiction with respect to the official con-  
 19 duct of the special prosecutor appointed under this chapter,  
 20 and such special prosecutor shall have the duty to cooperate  
 21 with the exercise of such oversight jurisdiction.

22       “§ 586. Presentations by Attorney General and Solicitor

23                       General

24       “Nothing in this chapter shall prevent the making by  
 25 the Attorney General or the Solicitor General of a presen-

1 tation to any court as to issues of law raised by any case  
2 or appeal.

3 **"§ 587. Special panel of the court**

4 " (a) The chief judge of the United States Court of  
5 Appeals for the District of Columbia shall assign three per-  
6 sons who are judges of the United States Court of Appeals  
7 for the District of Columbia to be the special panel of the  
8 court for the purposes of section 581 of this Act.

9 " (b) No judge who served as a member of this special  
10 panel for the appointment of the special prosecutor under  
11 this Act shall be eligible to participate in any judicial pro-  
12 ceedings involving a matter which involves such special  
13 prosecutor while such special prosecutor is serving pursuant  
14 to this Act.

15 " (c) The special panel shall be constituted until such  
16 time as the Office of Special Prosecutor is terminated pur-  
17 suant to either subsection (b) or (c) of section 584 of this  
18 Act.

19 **"§ 588. Effective date, termination of effect of chapter**

20 "This chapter shall take effect September 1, 1977, and  
21 shall cease to have effect upon termination of the Office of  
22 Special Prosecutor under either subsection (b) or (c) of  
23 section 584.

95TH CONGRESS  
1ST SESSION

# H. R. 8536

## IN THE HOUSE OF REPRESENTATIVES

JULY 26, 1977

Mr. EVANS of Delaware (for himself, Mr. BADIHAM, Mr. CORCORAN of Illinois, Mr. DORNAN, Mr. EDWARDS of Oklahoma, Mr. KEMP, Mr. KINDNESS, Mr. MARRIOTT, Mr. QUAYLE, Mr. SAWYER, Mr. STEERS, Mr. STANGELAND, and Mr. WALKER) introduced the following bill; which was referred to the Committee on the Judiciary

## A BILL

To require the President to appoint a special prosecutor to investigate and prosecute acts by agents of foreign governments to influence elected and nonelected officials and employees of the United States.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That this Act may be cited as the "Congressional Integrity  
4 Act of 1977".

5 SEC. 2. The President shall, within thirty days of enact-  
6 ment of this Act, cause to be appointed a special prosecutor  
7 to serve in the Department of Justice.

8 SEC. 3. The special prosecutor shall investigate, prepare,

1 and conduct prosecutions with respect to acts by agents of  
2 foreign governments designed to buy influence for such gov-  
3 ernments from elected officials and employees of the United  
4 States by providing to such officials and employees money,  
5 gifts, free trips, and other matters of value.

6 SEC. 4. (a) Notwithstanding any other provision of  
7 law, a special prosecutor appointed under this Act shall have,  
8 with respect to all matters in such special prosecutor's prose-  
9 cutorial jurisdiction established under this Act, full power,  
10 and independent authority—

11 (1) to conduct proceedings before grand juries and  
12 other investigations;

13 (2) to participate in court proceedings and engage  
14 in any litigation, including civil and criminal matters,  
15 as he deems necessary;

16 (3) to appeal any decision of a court in any case  
17 or proceeding in which such special prosecutor par-  
18 ticipates in an official capacity;

19 (4) to review all documentary evidence available  
20 from any source;

21 (5) to determine whether to contest the assertion  
22 of any testimonial privilege;

23 (6) to receive appropriate national security clear-  
24 ances and, if necessary, contest in court, including, where

1 appropriate, participation in in camera proceedings, any  
2 claim of privilege or attempt to withhold evidence on  
3 grounds of national security;

4 (7) to make applications to any Federal court for  
5 a grant of immunity to any witness, consistent with ap-  
6 plicable statutory requirements, or for warrants, sub-  
7 penas, or other court orders, and for purposes of sections  
8 6003, 6004, and 6005, of title 18, a special prosecutor  
9 may exercise the authority vested in a United States  
10 attorney or the Attorney General;

11 (8) to inspect, obtain, or use the original or a copy  
12 of any tax return, in accordance with the applicable  
13 statutes and regulations, and for purposes of section  
14 6103 of title 26, and the regulations issued thereunder,  
15 a special prosecutor may exercise the powers vested in  
16 a United States attorney or the Attorney General;

17 (9) to initiate and conduct prosecutions in any  
18 court of competent jurisdiction, frame and sign indict-  
19 ments, file informations, and handle all aspects of any  
20 case in the name of the United States; and

21 (10) to exercise all other investigative and prosecu-  
22 torial functions and powers of the Department of Justice,  
23 the Attorney General, and any other officer or employee  
24 of the Department of Justice, except that the Attorney

1       General shall exercise direction or control as to those  
2       matters that specifically require the Attorney General's  
3       personal action under section 2516 of title 18.

4       (b) A special prosecutor appointed under this chapter  
5       shall receive compensation at a per diem rate equal to the  
6       rate of basic pay for level IV of the Executive Schedule  
7       under section 5315 of title 5.

8       (c) For the purposes of carrying out the duties of  
9       the office of special prosecutor, a special prosecutor shall  
10      have power to appoint, fix the compensation, and assign the  
11      duties of such employees as such special prosecutor deems  
12      necessary (including investigators, attorneys, and part-time  
13      consultants). The positions of all such employees are ex-  
14      empted from the competitive service. No such employee may  
15      be compensated at a rate exceeding the maximum rate pro-  
16      vided for GS-18 of the General Schedule under section 5332  
17      of title 5.

18      (d) If requested by a special prosecutor, the Depart-  
19      ment of Justice shall provide to such special prosecutor assist-  
20      ance which shall include full access to any records, files, or  
21      other materials relevant to matters within his prosecutorial  
22      jurisdiction, and providing to such special prosecutor the re-  
23      sources and personnel required to perform such special pros-  
24      ecutor's duties.

1       (e) A special prosecutor may ask the Attorney General  
2 or the division of the court to refer matters related to the  
3 special prosecutor's prosecutorial jurisdiction. A special pros-  
4 ecutor may accept referral of a matter by the Attorney Gen-  
5 eral, if the matter relates to a matter within such special  
6 prosecutor's prosecutorial jurisdiction as established by the  
7 division of the court. If such a referral is accepted, the special  
8 prosecutor shall notify the division of the court.

9       (f) To the maximum extent practicable, a special prose-  
10 cutor shall comply with the written policies of the Depart-  
11 ment of Justice respecting enforcement of the criminal laws  
12 which have been promulgated prior to the special prosecu-  
13 tor's appointment.

14       SEC. 5. There are authorized to be appropriated such  
15 sums as may be necessary to carry out the provisions of this  
16 Act.

95TH CONGRESS  
1ST SESSION

# H. R. 9705

## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 20, 1977

Mr. MANN (for himself, Ms. HOLTZMAN, Mr. GUDGER, Mr. EVANS of Georgia, Mr. HYDE, Mr. DRINAN, and Mr. MAZZOLI) introduced the following bill; which was referred to the Committee on the Judiciary

## A BILL

To amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE

4 SECTION 1. This Act may be cited as the "Special  
5 Prosecutor Act of 1977".

6 SPECIAL PROSECUTOR

7 SEC. 2. (a) Title 28 of the United States Code is  
8 amended by inserting immediately after chapter 37 the fol-  
9 lowing new chapter:

I

## 1                   **"Chapter 39.—SPECIAL PROSECUTOR**

"Sec.

"591. Applicability of provisions of this chapter.

"592. Determination whether to apply for appointment of a special prosecutor.

"593. Duties of the division of the court.

"594. Authority and duties of a special prosecutor.

"595. Reporting and congressional oversight.

"596. Removal of a special prosecutor; termination of office.

"597. Relationship with Department of Justice.

"598. Termination of effect of chapter.

### 2   **"§ 591. Applicability of provisions of this chapter**

3           **"(a) The Attorney General shall conduct an investiga-**  
 4 **tion pursuant to the provisions of this chapter whenever**  
 5 **the Attorney General receives specific information that any**  
 6 **of the persons described in subsection (b) of this section**  
 7 **has—**

8           **"(1) violated any Federal criminal law involv-**  
 9 **ing the abuse of Federal office;**

10          **"(2) violated any Federal criminal law regulat-**  
 11 **ing the financing or conduct of elections or election**  
 12 **campaigns; or**

13          **"(3) violated any Federal criminal law relating**  
 14 **to the obstruction of justice or perjury, or conspired**  
 15 **to violate any such Federal criminal law or to defraud**  
 16 **the United States.**

17          **"(b) The persons referred to in subsection (a) of this**  
 18 **section are—**

1           “(1) the President and Vice President;

2           “(2) any individual serving in a position listed  
3 in section 5312 of title 5;

4           “(3) any individual working in the Executive  
5 Office of the President and compensated at a rate not  
6 less than the rate provided for level IV of the Executive  
7 Schedule under section 5315 of title 5;

8           “(4) any individual working in the Department of  
9 Justice and compensated at a rate not less than the rate  
10 provided for level III of the Executive Schedule under  
11 section 5314 of title 5; any assistant attorney general;  
12 the Director of Central Intelligence; the Deputy Director  
13 of Central Intelligence; and the Commissioner of Internal  
14 Revenue;

15           “(5) any individual who held any office or position  
16 described in any of paragraphs (1) through (4) of this  
17 subsection during the incumbency of the President or  
18 during the period the last preceding President held of-  
19 fice, if such preceding President was of the same political  
20 party as the incumbent President; and

21           “(6) a national campaign manager or chairman of  
22 any national campaign committee seeking the election or  
23 reelection of the President.

1   **"§ 592. Determination whether to apply for appointment of**  
2                   **a special prosecutor**

3       “(a) The Attorney General, upon receiving specific  
4 information that any of the persons described in section 591

5 (b) of this title has engaged in conduct described in section  
6 591 (a) of this title, shall conduct, for a period not to exceed  
7 sixty days, such preliminary investigation of the matter as  
8 the Attorney General deems appropriate.

9       “(b) (1) If the Attorney General, upon completion of  
10 the preliminary investigation, finds that the matter is so  
11 unsubstantiated that no further investigation or prosecution  
12 is warranted, the Attorney General shall so notify the divi-  
13 sion of the court specified in section 593 (a) of this title,  
14 and the division of the court shall have no power to appoint  
15 a special prosecutor.

16       “(2) Such notification shall be by memorandum con-  
17 taining a summary of the information received and a sum-  
18 mary of the results of any preliminary investigation.

19       “(3) Such memorandum shall not be revealed to any  
20 third party without leave of the division of the court.

21       “(c) (1) If the Attorney General, upon completion of  
22 the preliminary investigation, finds that the matter warrants  
23 further investigation or prosecution, or if sixty days elapse  
24 from the receipt of the information without a determination

1 by the Attorney General that the matter is so unsubstantiated  
2 as not to warrant further investigation or prosecution, then  
3 the Attorney General shall apply to the division of the  
4 court for the appointment of a special prosecutor.

5 “(2) If—

6 “(A) after the filing of a memorandum under sub-  
7 section (b) of this section, the Attorney General  
8 receives additional specific information about the mat-  
9 ter to which such memorandum related; and

10 “(B) the Attorney General determines, after such  
11 additional investigation as the Attorney General deems  
12 appropriate, that such information warrants further  
13 investigation or prosecution;

14 then the Attorney General shall, not later than sixty days  
15 after receiving such additional information, apply to the  
16 division of the court for the appointment of a special  
17 prosecutor.

18 “(3) If, in the course of any Federal criminal investi-  
19 gation, the Attorney General determines that the continua-  
20 tion of the investigation or that any resulting prosecution may  
21 so directly and substantially affect the political or personal  
22 interests of the President or the Attorney General or the in-  
23 terests of the President’s political party as to make it in-  
24 appropriate in the interest of the administration of justice

1 for the Department of Justice to conduct such investigation,  
2 then the Attorney General shall apply to the division of the  
3 court for the appointment of a special prosecutor.

4 “(d) (1) Any application under this chapter shall con-  
5 tain sufficient information to assist the division of the court  
6 to select a special prosecutor and to define that special  
7 prosecutor’s prosecutorial jurisdiction.

8 “(2) No application under this chapter shall be  
9 revealed to any third party without leave of the division of  
10 the court.

11 “(e) The Attorney General may ask a special prose-  
12 cutor to accept referral of a matter that relates to a matter  
13 within that special prosecutor’s prosecutorial jurisdiction.

14 **“§ 593. Duties of the division of the court**

15 “(a) The division of the court to which this chapter re-  
16 fers is the division established under section 49 of this title.

17 “(b) Upon receipt of an application under section 592  
18 (c) of this title, the division of the court shall appoint an  
19 appropriate special prosecutor and shall define that special  
20 prosecutor’s prosecutorial jurisdiction. A special prosecutor’s  
21 identity and prosecutorial jurisdiction shall be made public  
22 upon request of the Attorney General or upon a determina-  
23 tion of the division of the court that disclosure of the identity  
24 and prosecutorial jurisdiction of such special prosecutor  
25 would be in the best interests of justice.

1       “(c) The division of the court, upon request of the  
2 Attorney General which may be incorporated in an applica-  
3 tion under this chapter, may expand the prosecutorial juris-  
4 diction of an existing special prosecutor, and such expansion  
5 may be in lieu of the appointment of an additional special  
6 prosecutor.

7       “(d) The division of the court may not appoint as a  
8 special prosecutor any person who holds any office of profit  
9 or trust under the United States.

10       “(e) If a vacancy in office arises by reason of the  
11 resignation or death of a special prosecutor, the division of  
12 the court may appoint a special prosecutor to complete the  
13 work of the special prosecutor whose resignation or death  
14 caused the vacancy. If a vacancy in office arises by reason of  
15 the removal of a special prosecutor, the division of the court  
16 may appoint an acting special prosecutor to serve until any  
17 judicial review of such removal is completed. Upon the com-  
18 pletion of such judicial review, the division of the court shall  
19 take appropriate action.

20       **“§ 594. Authority and duties of a special prosecutor**

21       “(a) Notwithstanding any other provision of law, a  
22 special prosecutor appointed under this chapter shall have,  
23 with respect to all matters in such special prosecutor’s prose-  
24 cutorial jurisdiction established under this chapter, full power  
25 and independent authority to exercise all investigative and

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1 prosecutorial functions and powers of the Department of  
2 Justice, the Attorney General, and any other officer or  
3 employee of the Department of Justice, except that the  
4 Attorney General shall exercise direction or control as to  
5 those matters that specifically require the Attorney General's  
6 personal action under section 2516 of title 18.

7       “(b) A special prosecutor appointed under this chapter  
8 shall receive compensation at a per diem rate equal to the  
9 rate of basic pay for level IV of the Executive Schedule  
10 under section 5315 of title 5.

11       “(c) For the purposes of carrying out the duties of  
12 the office of special prosecutor, a special prosecutor shall  
13 have power to appoint, fix the compensation, and assign the  
14 duties of such employees as such special prosecutor deems  
15 necessary (including investigators, attorneys, and part-time  
16 consultants). The positions of all such employees are ex-  
17 empted from the competitive service. No such employee may  
18 be compensated at a rate exceeding the maximum rate pro-  
19 vided for GS-18 of the General Schedule under section 5332  
20 of title 5.

21       “(d) A special prosecutor may request assistance from  
22 the Department of Justice, and the Department of Justice  
23 shall provide that assistance, which may include access to  
24 any records, files, or other materials relevant to matters  
25 within such special prosecutor's prosecutorial jurisdiction,

1 and the use of the resources and personnel necessary to per-  
2 form such special prosecutor's duties.

3       “(e) A special prosecutor may accept referral of a  
4 matter by the Attorney General, if the matter relates to a  
5 matter within the prosecutorial jurisdiction established by  
6 the division of the court.

7       **“§ 595. Reporting and congressional oversight**

8       “(a) A special prosecutor appointed under this chap-  
9 ter may make public from time to time, and shall send to  
10 the Congress at least annually, statements or reports on  
11 the activities of such special prosecutor. These statements  
12 and reports shall contain such information as that special  
13 prosecutor deems appropriate.

14       “(b) (1) In addition to any reports made under sub-  
15 section (a) of this section, and before the termination of a  
16 special prosecutor's office under section 596 (b) of this title,  
17 such special prosecutor shall submit to the division of the  
18 court a report under this subsection.

19       “(2) A report under this subsection shall set forth  
20 fully and completely a description of the work of the special  
21 prosecutor, including the disposition of all cases brought,  
22 and the reasons for not prosecuting any matter within the  
23 prosecutorial jurisdiction of such special prosecutor which  
24 was not prosecuted.

25       “(3) The division of the court may release to the Con-

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1 gress, the public, or to any appropriate person, such portions  
2 of a report made under this subsection as the division deems  
3 appropriate. The division of the court shall make such orders  
4 as are appropriate to protect the rights of any individual  
5 named in such report and to prevent undue interference with  
6 any pending prosecution. The division of the court may make  
7 any portion of a report under this section available to any in-  
8 dividual named in such report for the purposes of receiving  
9 within a time limit set by the division of the court any com-  
10 ments or factual information that such individual may sub-  
11 mit. Such comments and factual information, in whole or in  
12 part, may in the discretion of such division be included as  
13 an appendix to such report.

14 “(c) A special prosecutor shall promptly advise the  
15 House of Representatives of any substantial and credible in-  
16 formation which such special prosecutor receives that may  
17 constitute grounds for an impeachment. Nothing in this chap-  
18 ter or section 49 of this title shall prevent the Congress or  
19 either House thereof from obtaining information in the course  
20 of an impeachment proceeding.

21 “(d) The appropriate committees of the Congress shall  
22 have oversight jurisdiction with respect to the official con-  
23 duct of any special prosecutor appointed under this chapter,  
24 and such special prosecutor shall have the duty to cooperate  
25 with the exercise of such oversight jurisdiction.

1       “(e) A majority of majority party members or a ma-  
2 jority of all nonmajority party members of a judiciary com-  
3 mittee of either House of the Congress may request in writ-  
4 ing that the Attorney General apply for the appointment of  
5 a special prosecutor under this chapter. Not later than thirty  
6 days after the receipt of such a request, the Attorney General  
7 shall provide written notification of any action the Attorney  
8 General has taken under this chapter in response to such  
9 request and, if no application has been made to the division  
10 of the court, why such application was not made. Such writ-  
11 ten notification shall be provided to the committee on which  
12 the persons making the request serve, and shall not be  
13 revealed to any third party, except that the committee may,  
14 either on its own initiative or upon the request of the At-  
15 torney General, make public such portion or portions of such  
16 notification as will not in the committee’s judgment prejudice  
17 the rights of any individual.

18       **“§ 596. Removal of a special prosecutor; termination of**  
19               **office**

20       “(a) (1) A special prosecutor appointed under this  
21 chapter may be removed from office, other than by im-  
22 peachment and conviction, only by the personal action of  
23 the Attorney General and only for extraordinary impropri-  
24 ety, physical disability, mental incapacity, or any other

1 condition that substantially impairs the performance of such  
2 special prosecutor's duties.

3       “(2) If a special prosecutor is removed from office, the  
4 Attorney General shall promptly submit to the division of  
5 the court and the judiciary committees of the Senate and  
6 the House of Representatives a report specifying the facts  
7 found and the ultimate grounds for such removal. The com-  
8 mittees shall make available to the public such report, except  
9 that each committee may, if necessary to avoid prejudicing  
10 the interests of the United States or of any individual, delete  
11 or postpone publishing any or all of the report. The division  
12 of the court may release any or all of such report in the same  
13 manner as a report released under section 525 (b) (3) of this  
14 title and under the same limitations as apply to the release  
15 of a report under that section.

16       “(3) A special prosecutor so removed may obtain ju-  
17 dicial review of the removal in a civil action commenced be-  
18 fore the division of the court and, if such removal was based  
19 on error of law or fact, may obtain reinstatement or other  
20 appropriate relief. The division of the court shall cause such  
21 an action to be in every way expedited.

22       “(b) (1) An office of special prosecutor shall terminate  
23 when (A) the special prosecutor notifies the Attorney  
24 General that the investigation of all matters within the prose-  
25 cutorial jurisdiction of such special prosecutor or accepted by

1 such special prosecutor under section 594 (e) of this title, and  
2 any resulting prosecutions, have been completed or so sub-  
3 stantially completed that it would be appropriate for the  
4 Department of Justice to complete such investigations and  
5 prosecutions and (B) the special prosecutor files a report  
6 in full compliance with section 595 (b) of this title.

7 “(2) The division of the court, either on its own motion  
8 or upon suggestion of the Attorney General, may terminate  
9 an office of special prosecutor at any time, on the ground  
10 that the investigation of all matters within the prosecutorial  
11 jurisdiction of the special prosecutor or accepted by such  
12 special prosecutor under section 594 (e), and any resulting  
13 prosecutions, have been completed or so substantially com-  
14 pleted that it would be appropriate for the Department of  
15 Justice to complete such investigations and prosecutions.

16 **“§ 597. Relationship with Department of Justice**

17 “(a) Whenever a matter is in the prosecutorial juris-  
18 diction of a special prosecutor or has been accepted by a  
19 special prosecutor under section 594 (e) of this title, the  
20 Department of Justice, the Attorney General, and all other  
21 officers and employees of the Department of Justice shall  
22 suspend all investigations and proceedings regarding such  
23 matter, except to the extent required by section 594 (d)  
24 of this title.

25 “(b) Nothing in this chapter shall prevent the Attorney

1 General or the Solicitor General from making a presentation  
 2 as amicus curiae to any court as to issues of law raised by  
 3 any case or proceeding in which a special prosecutor partic-  
 4 ipates in an official capacity or any appeal of such a case  
 5 or proceeding.

6 **“§ 598. Termination of effect of chapter**

7       “This chapter shall cease to have effect five years after  
 8 the date of the enactment of this chapter, except that this  
 9 chapter shall continue in effect with respect to then pending  
 10 matters before a special prosecutor that in the judgment of  
 11 such special prosecutor require such continuation until that  
 12 special prosecutor determines such matters have been com-  
 13 pleted.”.

14       (b) The tables of chapters for title 28 of the United  
 15 States Code and for part II of such title 28 are each amended  
 16 by inserting immediately after the item relating to chapter  
 17 37 the following new item :

“39. Special prosecutor.”.

18       (c) There are authorized to be appropriated for each  
 19 fiscal year such sums as may be necessary, to be held  
 20 by the Department of Justice as a contingent fund for  
 21 the use of any special prosecutors appointed under chapter  
 22 39 (relating to special prosecutor) of title 28 of the United  
 23 States Code in the carrying out of functions under such  
 24 chapter.

1 ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT SPECIAL  
2 PROSECUTORS

7       “(a) Beginning with the two-year period commencing  
8 on the date of the enactment of this section, three judges or  
9 justices shall be assigned for each successive two-year period  
10 to a division of the United States Court of Appeals for the  
11 District of Columbia to be the division of the court for the  
12 purposes of chapter 39 of this title.

17       “(c) In assigning judges or justices to sit on such  
18 division of the court, priority shall be given to senior retired  
19 circuit judges and senior retired justices.

1 or justice may be named to such division from a particular  
2 court.

3 “(e) Any vacancy in such division of the court shall  
4 be filled only for the remainder of the two-year period  
5 in which such vacancy occurs and in the same manner as  
6 initial assignments to such division were made.

7 “(f) Except as otherwise provided in chapter 39 of  
8 this title, no judge or justice who as a member of such divi-  
9 sion of the court participated in a function conferred on the  
10 division under chapter 39 of this title involving a special  
11 prosecutor shall be eligible to participate in any judicial  
12 proceeding concerning a matter which involves such special  
13 prosecutor while such special prosecutor is serving in that  
14 office or which involves the exercise of such special prose-  
15 cutor’s official duties, regardless of whether such special  
16 prosecutor is still serving in that office.”.

17 (b) The table of sections for chapter 3 of title 28 of  
18 the United States Code is amended by adding at the end  
19 the following item:

“49. Assignment of judges to division to appoint special prosecutors.”.

20 DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE

21 DEPARTMENT OF JUSTICE

22 SEC. 4. (a) Chapter 31 of title 28 of the United States  
23 Code is amended by adding at the end the following:

1   **“§ 528. Disqualification of officers and employees of the**  
2           **Department of Justice**

3           “The Attorney General shall promulgate rules and regu-  
4 lations which require the disqualification of any officer or  
5 employee of the Department of Justice, including a United  
6 States attorney or a member of such attorney’s staff, from  
7 participation in a particular investigation or prosecution if  
8 such participation may result in a personal, financial, or  
9 political conflict of interest, or the appearance thereof. Such  
10 rules and regulations may provide that a willful violation of  
11 any provision thereof shall result in removal from office.”.

12           (b) The table of sections for chapter 31 of title 28 of  
13 the United States Code is amended by adding at the end the  
14 following:

“528. Disqualification of officers and employees of the Department of  
Justice.”.

## IN THE HOUSE OF REPRESENTATIVES

Mr. COCHRAN of Mississippi (for himself and Mr. KETCHUM) introduced the following bill; which was referred to the Committee on the Judiciary

To amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases, and for other purposes.

## 5 FINDINGS AND PURPOSES

7 (1) the prosecution of misconduct is necessary to  
8 insure the integrity of government;

9 (2) political considerations should play no part in

1 the enforcement of Federal laws as against Government  
2 officials;

3 (3) the level of faith of the American people in the  
4 Government's willingness to police itself is disturbingly  
5 low; and

6 (4) in order to guarantee thorough, nonpartisan in-  
7 vestigation and prosecution of misconduct by Govern-  
8 ment officials, establishment of an appointive procedure  
9 for an independent special prosecutor to investigate and  
10 prosecute misconduct by Government officials is  
11 necessary.

#### 12 SPECIAL PROSECUTOR

13 SEC. 3. (a) Title 28 of the United States Code is  
14 amended by inserting the following new chapter immediately  
15 after chapter 37:

#### 16 "Chapter 39.—SPECIAL PROSECUTOR

"Sec.

"591. Application for appointment by Attorney General.

"592. Appointment by special court.

"593. Special court.

"594. Prosecutorial jurisdiction; authority.

"595. Qualifications of special prosecutor.

"596. Removal or termination.

"597. Oversight.

"598. Relation with Department of Justice.

#### 17 "§ 591. Application for appointment by Attorney General

18 " (a) Upon receiving any specific information that any  
19 of the persons described in subsection (b) of this section has  
20 knowingly authorized or engaged in any violation of Federal  
21 law other than a petty offense as defined by section 1 of title

1 18 of the United States Code or has conspired to violate  
2 any such Federal law, the Attorney General shall conduct,  
3 for a period not to exceed sixty days, a preliminary inves-  
4 tigation to determine whether the matter under investigation  
5 is so insubstantial that no further investigation or prosecution  
6 is warranted.

7 “(b) The persons referred to in subsection (a) of this  
8 section are as follows:

9 “(1) the President or Vice President;

10 “(2) any person occupying a position compensated  
11 at a rate equal to or greater than level I or level II of  
12 the Executive Schedule under section 5312 or 5313  
13 of title 5 of the United States Code;

14 “(3) any person occupying a position included  
15 within level III and IV of the Executive Schedule un-  
16 der section 5314 or 5315 of title 5 of the United States  
17 Code;

18 “(4) a national campaign manager or chairman of  
19 any national campaign committee seeking election or  
20 reelection of the President;

21 “(5) a Member of Congress (including a Delegate  
22 to the House of Representatives or Resident Commis-  
23 sioner in the House of Representatives);

24 “(6) a member of the Federal judiciary; or

25 “(7) any individual who held any office or posi-

1       tion described in paragraphs (1) through (6) of this  
2       subsection if the offense being investigated allegedly  
3       occurred in whole or in part while such person occupied  
4       such office or position.

5       “(c) If the Attorney General finds the matter subject  
6       to preliminary investigation in accordance with subsection  
7       (a) of this section is so unsubstantiated that no further in-  
8       vestigation or prosecution is warranted, the Attorney Gen-  
9       eral shall file a memorandum with the special court. Such  
10      memorandum shall contain a complete description of the  
11      information received, the investigative steps taken, and the  
12      results of the preliminary investigation.

13      “(d) If, after filing a memorandum under subsection  
14      (c) of this section, the Attorney General receives additional  
15      information about the matter to which such memorandum  
16      related, which information, in the judgment of the Attorney  
17      General, warrants further investigation or prosecution, the  
18      Attorney General shall, not later than ten days after receiv-  
19      ing such additional information, apply to the special court for  
20      appointment of a special prosecutor. Should the Attorney  
21      General determine that such additional information does not  
22      warrant further investigation, the Attorney General shall file  
23      a supplementary memorandum with the special court con-  
24      taining a complete description of such additional informa-

1 tion and an explanation of why further investigation or pros-  
2 ecution was deemed unwarranted.

3       “(e) If the Attorney General finds the matter subject  
4 to preliminary investigation in accordance with subsection  
5 (a) of this section warrants further investigation or prosecu-  
6 tion, or if sixty days elapse from the receipt of the informa-  
7 tion and the Attorney General has not yet determined that  
8 the matter is so unsubstantiated that the matter does not war-  
9 rant further investigation or prosecution, then the Attorney  
10 General shall apply to the special court for the appointment  
11 of a special prosecutor.

12       “(f) If, in the course of any Federal criminal investiga-  
13 tion, the Attorney General determines that continuation of  
14 the investigation or of a resulting prosecution or the outcome  
15 of such investigation or prosecution may so directly and sub-  
16 stantially affect the political interests of the President or the  
17 President’s political party or political or personal interests of  
18 the Attorney General as to make it inappropriate in the  
19 interests of the administration of justice for the Department  
20 of Justice to conduct such investigation, then the Attorney  
21 General shall apply to the special court for the appointment  
22 of a special prosecutor.

23       “(g) Any investigation being conducted by the At-  
24 torney General, any application or memorandum filed under

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1 this section, or any application or information received or  
2 compiled by the special court prior to appointment of a  
3 special prosecutor shall not be revealed to a third party  
4 without leave of the court.

5 “(h) Upon receipt of an application under this section,  
6 the special court shall, within ten days thereof, appoint a  
7 special prosecutor and shall inform the Attorney General and  
8 the Congress of, and shall make public, the name of such  
9 special prosecutor.

10 “(i) The Attorney General may request that the special  
11 court assign new matters to an acting special prosecutor or  
12 that the prosecutorial jurisdiction of such a special prosecutor  
13 be expanded, and the court may make appropriate orders  
14 for such assignment or expansion.

15 “(j) A judiciary committee of either House of the  
16 Congress may request that the Attorney General apply for  
17 the appointment of a special prosecutor under this section.  
18 Not later than thirty days after the receipt of such request,  
19 the Attorney General shall notify the committee making  
20 the request and the special court in writing of any action  
21 the Attorney General has taken under this section, and, if no  
22 application has been made to the special court, why such  
23 application was not made. Such written notification shall  
24 not be revealed to any third party except that the commit-  
25 tee may, either upon its own initiative or upon the request

1 of the Attorney General or the special court, make public  
2 such portion or portions of such notification as will not in the  
3 committee's judgment prejudice the rights of any individual.

4       “(k) Upon application of a majority of majority party  
5 members or a majority of all nonmajority party members  
6 of a judiciary committee of either House of the Congress,  
7 the United States District Court for the District of Columbia  
8 may issue an appropriate order (including an order in the  
9 nature of a writ of mandamus) commanding the Attorney  
10 General to comply with the provisions of this chapter.

11   **“§ 592. Appointment by special court**

12       “(a) Upon receiving any specific information that any  
13 of the persons described in subsection (b) of section 591  
14 have engaged in any of the activities described in subsection  
15 (a) of section 591, the special court shall, within ten days  
16 of the receipt of such information, direct the Attorney Gen-  
17 eral to conduct, for a period not to exceed sixty days, a  
18 preliminary investigation to determine whether the matter is  
19 so insubstantial that no further investigation or prosecution  
20 is warranted: *Provided, however,* That where the informa-  
21 tion received by the special court is determined by at least  
22 two members of the courts directly and substantially to affect  
23 the political interests of the President or of the President's  
24 political party or the political or personal interests of the  
25 Attorney General as to make it inappropriate in the inter-

1 ests of the administration of justice for the Department of  
2 Justice to conduct such investigation, or where the court  
3 determines that it is otherwise inappropriate for the De-  
4 partment of Justice to conduct the investigation, then the  
5 special court shall, within ten days of making such deter-  
6 mination, appoint a special prosecutor if the court determines  
7 that the information received warrants such appointment.

8 “(b) If, within ten days of receipt of a memorandum  
9 from the Attorney General under subsection (c) or (d) of  
10 section 591 explaining why further investigation or prosecu-  
11 tion is felt unwarranted, at least two members of the court  
12 determine that further investigation is warranted, then the  
13 court shall appoint a special prosecutor within thirty days  
14 of making such determination.

15 “(c) The special court shall appoint a special prosecutor  
16 within thirty days of receipt of an application under subsec-  
17 tion (d) or (e) of section 591 by the Attorney General for  
18 appointment of a special prosecutor.

19 “(d) The special court may, of its own motion as deter-  
20 mined by at least two of its members, assign new matters  
21 to an acting special prosecutor or may enlarge the prose-  
22 cutorial jurisdiction of such special prosecutor.

23 **“§ 593. Special court**

24 “(a) The special court to which functions are given  
25 under this chapter shall be comprised of three retired

1 Federal circuit court judges appointed by the Chief Justice  
2 of the United States Supreme Court for a term of two years.

3 “(b) The members of the special court shall not be  
4 assigned to any case involving a special prosecutor appointed  
5 by the court.

6 **“§ 594. Prosecutorial jurisdiction; authority**

7 “(a) Notwithstanding any other provision of law, a  
8 special prosecutor appointed under this chapter shall  
9 have, with respect to all matters in such special prosecu-  
10 tor’s prosecutorial jurisdiction established under this chapter,  
11 all the investigative and prosecutorial functions and powers  
12 of the Department of Justice, the Attorney General, and any  
13 other officer or employee of the Department of Justice.

14 “(b) A special prosecutor appointed under this chapter  
15 shall receive compensation at a per diem rate equal to the  
16 rate of basic pay for level IV of the Executive Schedule  
17 under section 5315 of title 5 of the United States Code. For  
18 the purposes of carrying out the duties of the office of special  
19 prosecutor, such special prosecutor shall have power to  
20 appoint, fix the compensation, and assign the duties of such  
21 employees as such special prosecutor deems necessary (in-  
22 cluding investigators, attorneys, and part-time consultants).  
23 The positions of all such employees are exempted from the  
24 competitive service. No such employee may be compensated  
25 at a rate exceeding the maximum rate provided for GS-18

1 of the General Schedule under section 5332 of title 5 of the  
2 United States Code.

3 “(c) A special prosecutor may request assistance from  
4 the Department of Justice, and the Department of Justice  
5 shall provide that assistance, which may include access to any  
6 records, files, or other materials relevant to matters within  
7 the special prosecutor’s prosecutorial jurisdiction, and the use  
8 of the resources and personnel necessary to perform such  
9 special prosecutor’s duties.

10 “(d) A special prosecutor appointed under this chap-  
11 ter shall submit to the special court and to the judiciary  
12 committees of both Houses of the Congress a summary of his  
13 activities with regard to the office. Such summary shall be  
14 submitted at least annually and within sixty days of the  
15 termination of every investigatory or prosecutorial activity.  
16 The summary shall contain such material as the special  
17 prosecutor deems appropriate but shall contain sufficient ma-  
18 terial to indicate the reason for all determinations made by  
19 the special prosecutor. The special court or the Congress may  
20 request such additional information as is deemed necessary.

21 “(e) The special court or the Congress may release  
22 to the public or to any appropriate person such report or  
23 portions thereof as are deemed appropriate. The court shall  
24 make such orders as are appropriate to protect the rights of  
25 any individual named in such report and prevent undue

1 interference with any pending prosecution. The special court  
2 may make any portion of a report available to any individ-  
3 ual named in such report for the purposes of receiving within  
4 a time limit set by the court any comments or factual in-  
5 formation that such individual may submit. Such comments  
6 and information, in whole or in part, may in the discretion  
7 of the court be included as an appendix to such report.

8 **"§ 595. Qualifications of special prosecutor**

9       “(a) A person shall not be appointed special prosecu-  
10 tor unless he shall have been a member in good standing of  
11 a State bar association or of the District of Columbia bar  
12 association for at least ten years and a member of the  
13 Supreme Court bar for at least five years.

14       “(b) A person shall not be appointed special prosecu-  
15 tor if he has at any time during the preceding five years  
16 held a high-level position of trust and responsibility on the  
17 campaign staff of, or in an organization or political party  
18 working on behalf of, a candidate for any elective Federal  
19 office.

20       “(c) A person shall not be appointed special prosecu-  
21 tor where there is any appearance of conflict of interest or  
22 other condition that would make such appointment in-  
23 appropriate.

24 **"§ 596. Removal or termination**

25       “(a) A special prosecutor appointed under this chapter

1 may be removed from office, other than by impeachment  
2 and conviction, only by the special court and only for ex-  
3 traordinary impropriety, or such incapacitation or other con-  
4 dition as substantially impairs the performance of such special  
5 prosecutor's duties.

6       “(b) The office of special prosecutor shall terminate  
7 upon the submission by such special prosecutor of notifica-  
8 tion to the special court and to the Attorney General that  
9 the investigation of all matters within the prosecutorial juris-  
10 diction of such special prosecutor and any resulting prosecu-  
11 tions have been completed. No such submission shall be  
12 effective to terminate such office until after the completion  
13 and filing of the report required under section 594 of this  
14 title.

15 **“§ 597. Oversight**

16       “‘The appropriate committees of the Congress shall have  
17 oversight jurisdiction with respect to the official conduct of  
18 any special prosecutor appointed under this chapter, and  
19 such special prosecutor shall be required to cooperate with  
20 the exercise of such oversight jurisdiction.

21 **“§ 598. Relationship with Department of Justice**

22       “(a) Whenever a matter is in the prosecutorial juris-  
23 diction of a special prosecutor or has been accepted by a  
24 special prosecutor under section 594(e) of this title, the  
25 Department of Justice, the Attorney General, and all other

1 officers and employees of the Department of Justice shall  
2 suspend all investigations and proceedings regarding such  
3 matter, except to the extent required by section 594 (c)  
4 of this title.

5 “(b) Nothing in this chapter shall prevent the Attorney  
6 General or the Solicitor General from making a presentation  
7 as amicus curiae to any court as to issues of law raised by  
8 any case or proceeding in which a special prosecutor partic-  
9 ipates in an official capacity or any appeal of such a case  
10 or proceeding.”.

11 **DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE**  
12 **DEPARTMENT OF JUSTICES**

13 **SEC. 4. (a)** Chapter 31 of title 28 of the United States  
14 Code is amended by adding at the end the following:

15 **“§ 528. Disqualification of officers and employees of the**  
16 **Department of Justice**

17 **“The Attorney General shall promulgate rules and regu-**  
18 **lations which require the disqualification of any officer or**  
19 **employee of the Department of Justice, including a United**  
20 **States attorney or a member of such attorney’s staff, from**  
21 **participation in a particular investigation or prosecution if**  
22 **such participation may result in a personal, financial, or**  
23 **political conflict of interest, or the appearance thereof. Such**  
24 **rules and regulations may provide that a willful violation of**  
25 **any provision thereof shall result in removal from office.”.**

- 1       (b) The table of sections for chapter 31 of title 28 of  
2 the United States Code is amended by adding at the end the  
3 following:

“528. Disqualification of officers and employees of the Department of  
Justice.”.

95TH CONGRESS  
2D SESSION

# H. R. 10868

## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 9, 1978

Mr. COCHRAN of Mississippi (for himself, Mr. KETCHUM, Mr. CLEVELAND, Mr. SCHULZE, Mr. BROTHILL, Mr. COUGHLIN, Mr. KINDNESS, Mr. CORCORAN of Illinois, and Mr. WALKER) introduced the following bill; which was referred to the Committee on the Judiciary

## A BILL

To amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That this Act may be cited as the "Special Prosecutor Act  
4 of 1978".

### 5 FINDINGS AND PURPOSES

6 SEC. 2. The Congress finds that—

7 (1) the prosecution of misconduct by government  
8 officials is necessary to ensure the integrity of govern-  
9 ment;

10 (2) political considerations should play no part in

1           **"Chapter 39.—SPECIAL PROSECUTOR**

"Sec.

"591. Applicability of provisions of this chapter.

"592. Determination whether to apply for appointment of a special prosecutor.

"593. Duties of the division of the court.

"594. Authority and duties of a special prosecutor.

"595. Reporting and congressional oversight.

"596. Removal of a special prosecutor; termination of office.

"597. Relationship with Department of Justice.

"598. Termination of effect of chapter.

2   **"§ 591. Applicability of provisions of this chapter**

3           "(a) The Attorney General shall conduct an investiga-  
4   tion pursuant to the provisions of this chapter whenever the  
5   Attorney General receives specific information that any of  
6   the persons described in subsection (b) of this section has—

7           " (1) violated any Federal criminal law involving  
8   the abuse of Federal office;

9           " (2) violated any Federal criminal law regulating  
10   the financing or conduct of elections or election cam-  
11   paigns; or

12          " (3) violated any Federal criminal law relating to  
13   the obstruction of justice or perjury, or conspired to vio-  
14   late any such Federal criminal law or to defraud the  
15   United States.

16          "(b) The persons referred to in subsection (a) of this  
17   section are—

18          " (1) the President and Vice President;

19          " (2) any individual serving in a position listed in  
20   section 5312 of title 5;

1           “(3) any individual working in the Executive  
2       Office of the President and compensated at a rate not  
3       less than the rate provided for level IV of the Executive  
4       Schedule under section 5315 of title 5;

5           “(4) any individual working in the Department of  
6       Justice and compensated at a rate not less than the rate  
7       provided for level III of the Executive Schedule under  
8       section 5314 of title 5; any assistant attorney general;  
9       the Director of Central Intelligence; the Deputy Director  
10      of Central Intelligence; and the Commissioner of Internal  
11      Revenue;

12          “(5) any individual who held any office or position  
13      described in any of paragraphs (1) through (4) of this  
14      subsection during the incumbency of the President or  
15      during the period the last preceding President held of-  
16      fice, if such preceding President was of the same political  
17      party as the incumbent President; and

18          “(6) a national campaign manager or chairman of  
19      any national campaign committee seeking the election or  
20      reelection of the President.

21      “§ 592. Determination whether to apply for appointment of  
22          a special prosecutor

23          “(a) The Attorney General, upon receiving specific  
24      information that any of the persons described in section 591  
25      (b) of this title has engaged in conduct described in section

1 591 (a) of this title, shall conduct, for a period not to exceed  
2 sixty days, such preliminary investigation of the matter as  
3 the Attorney General deems appropriate.

4 “(b) (1) If the Attorney General, upon completion of  
5 the preliminary investigation, finds that the matter is so  
6 unsubstantiated that no further investigation or prosecution  
7 is warranted, the Attorney General shall so notify the divi-  
8 sion of the court specified in section 593 (a) of this title,  
9 and the division of the court shall have no power to appoint  
10 a special prosecutor.

11 “(2) Such notification shall be by memorandum con-  
12 taining a summary of the information received and a sum-  
13 mary of the results of any preliminary investigation.

14 “(3) Such memorandum shall not be revealed to any  
15 third party without leave of the division of the court.

16 “(c) (1) If the Attorney General, upon completion of  
17 the preliminary investigation, finds that the matter warrants  
18 further investigation or prosecution, or if sixty days elapse  
19 from the receipt of the information without a determination  
20 by the Attorney General that the matter is so unsubstantiated  
21 as not to warrant further investigation or prosecution, then  
22 the Attorney General shall apply to the division of the  
23 court for the appointment of a special prosecutor.

24 “(2) If—

1           “(A) after the filing of a memorandum under sub-  
2       section (b) of this section, the Attorney General  
3       receives additional specific information about the mat-  
4       ter to which such memorandum related; and

5           “(B) the Attorney General determines, after such  
6       additional investigation as the Attorney General deems  
7       appropriate, that such information warrants further  
8       investigation or prosecution;

9       then the Attorney General shall, not later than sixty days  
10      after receiving such additional information, apply to the  
11      division of the court for the appointment of a special  
12      prosecutor.

13      “(3) If, in the course of any Federal criminal investi-  
14      gation, the Attorney General determines that the continua-  
15      tion of the investigation or that any resulting prosecution may  
16      so directly and substantially affect the political or personal  
17      interests of the President or the Attorney General or the in-  
18      terests of the President's political party as to make it in-  
19      appropriate in the interest of the administration of justice  
20      for the Department of Justice to conduct such investigation,  
21      then the Attorney General shall apply to the division of the  
22      court for the appointment of a special prosecutor.

23      “(d) (1) Any application under this chapter shall con-  
24      tain sufficient information to assist the division of the court

1 to select a special prosecutor and to define that special  
2 prosecutor's prosecutorial jurisdiction.

3       “(2) No application under this chapter shall be  
4 revealed to any third party without leave of the division of  
5 the court.

6       “(e) The Attorney General may ask a special prose-  
7 cutor to accept referral of a matter that relates to a matter  
8 within that special prosecutor's prosecutorial jurisdiction.

9       **“§ 593. Duties of the division of the court**

10       “(a) The division of the court to which this chapter re-  
11 fers is the division established under section 49 of this title.

12       “(b) Upon receipt of an application under section 592  
13 (c) of this title, the division of the court shall appoint an  
14 appropriate special prosecutor and shall define that special  
15 prosecutor's prosecutorial jurisdiction. A special prosecutor's  
16 identity and prosecutorial jurisdiction shall be made public  
17 upon request of the Attorney General or upon a determina-  
18 tion of the division of the court that disclosure of the identity  
19 and prosecutorial jurisdiction of such special prosecutor  
20 would be in the best interests of justice.

21       “(c) The division of the court, upon request of the  
22 Attorney General which may be incorporated in an applica-  
23 tion under this chapter, may expand the prosecutorial juris-  
24 diction of an existing special prosecutor, and such expansion

1 may be in lieu of the appointment of an additional special  
2 prosecutor.

3 “(d) The division of the court may not appoint as a  
4 special prosecutor any person who holds any office of profit  
5 or trust under the United States.

6 “(e) If a vacancy in office arises by reason of the  
7 resignation or death of a special prosecutor, the division of  
8 the court may appoint a special prosecutor to complete the  
9 work of the special prosecutor whose resignation or death  
10 caused the vacancy. If a vacancy in office arises by reason of  
11 the removal of a special prosecutor, the division of the court  
12 may appoint an acting special prosecutor to serve until any  
13 judicial review of such removal is completed. Upon the com-  
14 pletion of such judicial review, the division of the court shall  
15 take appropriate action.

16 “§ 594. Authority and duties of a special prosecutor

17 “(a) Notwithstanding any other provision of law, a  
18 special prosecutor appointed under this chapter shall have,  
19 with respect to all matters in such special prosecutor's prose-  
20 cutorial jurisdiction established under this chapter, full power  
21 and independent authority to exercise all investigative and  
22 prosecutorial functions and powers of the Department of Jus-  
23 tice, the Attorney General, and any other officer or em-  
24 ployee of the Department of Justice, except that the Attor-

1 ney General shall exercise direction or control as to those  
2 matters that specifically require the Attorney General's per-  
3 sonal action under section 2516 of title 18.

4       “(b) A special prosecutor appointed under this chapter  
5 shall receive compensation at a per diem rate equal to the  
6 rate of basic pay for level IV of the Executive Schedule  
7 under section 5315 of title 5.

8       “(c) For the purposes of carrying out the duties of the  
9 office of special prosecutor, a special prosecutor shall have  
10 power to appoint, fix the compensation, and assign the  
11 duties of such employees as such special prosecutor deems  
12 necessary (including investigators, attorneys, and part-time  
13 consultants). The positions of all such employees are ex-  
14 empted from the competitive service. No such employee may  
15 be compensated at a rate exceeding the maximum rate pro-  
16 vided for GS-18 of the General Schedule under section 5332  
17 of title 5.

18       “(d) A special prosecutor may request assistance from  
19 the Department of Justice, and the Department of Justice  
20 shall provide that assistance, which may include access to  
21 any records, files, or other materials relevant to matters  
22 within such special prosecutor's prosecutorial jurisdiction,  
23 and the use of the resources and personnel necessary to per-  
24 form such special prosecutor's duties.

1       “(e) A special prosecutor may accept referral of a  
2 matter by the Attorney General, if the matter relates to a  
3 matter within the prosecutorial jurisdiction established by  
4 the division of the court.

5       **“§ 595. Reporting and congressional oversight**

6       “(a) A special prosecutor appointed under this chap-  
7 ter may make public from time to time, and shall send to  
8 the Congress at least annually, statements or reports on  
9 the activities of such special prosecutor. These statements  
10 and reports shall contain such information as that special  
11 prosecutor deems appropriate.

12       “(b) (1) In addition to any reports made under sub-  
13 section (a) of this section, and before the termination of a  
14 special prosecutor's office under section 596 (b) of this title,  
15 such special prosecutor shall submit to the division of the  
16 court a report under this subsection.

17       “(2) A report under this subsection shall set forth  
18 fully and completely a description of the work of the special  
19 prosecutor, including the disposition of all cases brought,  
20 and the reasons for not prosecuting any matter within the  
21 prosecutorial jurisdiction of such special prosecutor which  
22 was not prosecuted.

23       “(3) The division of the court may release to the Con-  
24 gress, the public, or to any appropriate person, such portions

1 of a report made under this subsection as the division deems  
2 appropriate. The division of the court shall make such orders  
3 as are appropriate to protect the rights of any individual  
4 named in such report and to prevent undue interference with  
5 any pending prosecution. The division of the court may make  
6 any portion of a report under this section available to any in-  
7 dividual named in such report for the purposes of receiving  
8 within a time limit set by the division of the court any com-  
9 ments or factual information that such individual may sub-  
10 mit. Such comments and factual information, in whole or in  
11 part, may in the discretion of such division be included as  
12 an appendix to such report.

13 “(e) A special prosecutor shall promptly advise the  
14 House of Representatives of any substantial and credible in-  
15 formation which such special prosecutor receives that may  
16 constitute grounds for an impeachment. Nothing in this chap-  
17 ter or section 49 of this title shall prevent the Congress or  
18 either House thereof from obtaining information in the course  
19 of an impeachment proceeding.

20 “(d) The appropriate committees of the Congress shall  
21 have oversight jurisdiction with respect to the official con-  
22 duct of any special prosecutor appointed under this chapter,  
23 and such special prosecutor shall have the duty to cooperate  
24 with the exercise of such oversight jurisdiction.

1       “(e) A majority of majority party members or a ma-  
2       jority of all nonmajority party members of a judiciary com-  
3       mittee of either House of the Congress may request in writ-  
4       ing that the Attorney General apply for the appointment of  
5       a special prosecutor under this chapter. Not later than thirty  
6       days after the receipt of such a request, the Attorney General  
7       shall provide written notification of any action the Attorney  
8       General has taken under this chapter in response to such  
9       request and, if no application has been made to the division  
10      of the court, why such application was not made. Such writ-  
11      ten notification shall be provided to the committee on which  
12      the persons making the request serve, and shall not be  
13      revealed to any third party, except that the committee may,  
14      either on its own initiative or upon the request of the At-  
15      torney General, make public such portion or portions of such  
16      notification as will not in the committee’s judgment prejudice  
17      the rights of any individual.

18   **“§ 596. Removal of a special prosecutor; termination of**  
19                           **office**

20      “(a) (1) A special prosecutor appointed under this  
21      chapter may be removed from office, other than by im-  
22      peachment and conviction, only by the personal action of  
23      the Attorney General and only for extraordinary impropri-  
24      ety, physical disability, mental incapacity, or any other

1 condition that substantially impairs the performance of such  
2 special prosecutor's duties.

3       “(2) If a special prosecutor is removed from office, the  
4 Attorney General shall promptly submit to the division of  
5 the court and the judiciary committees of the Senate and  
6 the House of Representatives a report specifying the facts  
7 found and the ultimate grounds for such removal. The com-  
8 mittees shall make available to the public such report, except  
9 that each committee may, if necessary to avoid prejudicing  
10 the interests of the United States or of any individual, delete  
11 or postpone publishing any or all of the report. The division  
12 of the court may release any or all of such report in the same  
13 manner as a report released under section 525 (b) (3) of this  
14 title and under the same limitations as apply to the release  
15 of a report under that section.

16       “(3) A special prosecutor so removed may obtain ju-  
17 dicial review of the removal in a civil action commenced be-  
18 fore the division of the court and, if such removal was based  
19 on error of law or fact, may obtain reinstatement or other  
20 appropriate relief. The division of the court shall cause such  
21 an action to be in every way expedited.

22       “(b) (1) An office of special prosecutor shall terminate  
23 when (A) the special prosecutor notifies the Attorney  
24 General that the investigation of all matters within the prose-  
25 cutorial jurisdiction of such special prosecutor or accepted by

1 such special prosecutor under section 594 (e) of this title, and  
2 any resulting prosecutions, have been completed or so sub-  
3 stantially completed that it would be appropriate for the  
4 Department of Justice to complete such investigations and  
5 prosecutions and (B) the special prosecutor files a report  
6 in full compliance with section 595 (b) of this title.

7 “(2) The division of the court, either on its own motion  
8 or upon suggestion of the Attorney General, may terminate  
9 an office of special prosecutor at any time, on the ground  
10 that the investigation of all matters within the prosecutorial  
11 jurisdiction of the special prosecutor or accepted by such  
12 special prosecutor under section 594 (e), and any resulting  
13 prosecutions, have been completed or so substantially com-  
14 pleted that it would be appropriate for the Department of  
15 Justice to complete such investigations and prosecutions.

16 “§ 597. Relationship with Department of Justice

17 “(a) Whenever a matter is in the prosecutorial juris-  
18 diction of a special prosecutor or has been accepted by a  
19 special prosecutor under section 594 (e) of this title, the  
20 Department of Justice, the Attorney General, and all other  
21 officers and employees of the Department of Justice shall  
22 suspend all investigations and proceedings regarding such  
23 matter, except to the extent required by section 594 (d)  
24 of this title.

1       “(b) Nothing in this chapter shall prevent the Attorney  
 2       General or the Solicitor General from making a presentation  
 3       as *amicus curiae* to any court as to issues of law raised by  
 4       any case or proceeding in which a special prosecutor partic-  
 5       ipates in an official capacity or any appeal of such a case  
 6       or proceeding.

7       “§ 598. Termination of effect of chapter

8       “‘This chapter shall cease to have effect five years after  
 9       the date of the enactment of this chapter, except that this  
 10       chapter shall continue in effect with respect to then pending  
 11       matters before a special prosecutor that in the judgment of  
 12       such special prosecutor require such continuation until that  
 13       special prosecutor determines such matters have been  
 14       completed.’”.

15       (b) The tables of chapters for title 28 of the United  
 16       States Code and for part II of such title 28 are each amended  
 17       by inserting immediately after the item relating to chapter  
 18       37 the following new item :

“39. Special prosecutor.”.

19       (c) There are authorized to be appropriated for each  
 20       fiscal year such sums as may be necessary, to be held by the  
 21       Department of Justice as a contingent fund for the use  
 22       of any special prosecutors appointed under chapter 39 (re-  
 23       lating to special prosecutor) of title 28 of the United States  
 24       Code in the carrying out of functions under such chapter.

SEC. 3. (a) Chapter 3 of title 28 of the United States Code is amended by adding at the end the following:

5   **“§ 49. Assignment of judges to division to appoint special**  
6                   **prosecutors**

7       “(a) Beginning with the two-year period commencing  
8       on the date of the enactment of this section, three judges or  
9       justices shall be assigned for each successive two-year period  
10      to a division of the United States Court of Appeals for the  
11      District of Columbia to be the division of the court for the  
12      purposes of chapter 39 of this title.

13       “(b) Except as provided under subsection (f) of this  
14 section, assignment to such division of the court shall not be  
15 a bar to other judicial assignments during the term of such  
16 division.

17       “(c) In assigning judges or justices to sit on such  
18 division of the court, priority shall be given to senior ~~retired~~  
19 circuit judges and senior retired justices.

20       “(d) The Chief Justice of the United States shall des-  
21       ignate and assign three circuit court judges or justices, one  
22       of whom shall be a judge of the United States Court of Ap-  
23       peals for the District of Columbia, to such division of the  
24       court. Not more than one judge or justice or *senior or re-*

1 tired judge or justice may be named to such division from a  
2 particular court.

3 “(e) Any vacancy in such division of the court shall  
4 be filled only for the remainder of the two-year period  
5 in which such vacancy occurs and in the same manner as  
6 initial assignments to such division were made.

7 “(f) Except as otherwise provided in chapter 39 of  
8 this title, no judge or justice who as a member of such divi-  
9 sion of the court member of such division of the court who  
10 participated in a function conferred on the division under  
11 chapter 39 of this title involving a special prosecutor shall  
12 be eligible to participate in any judicial proceeding concern-  
13 ing a matter which involves such special prosecutor while  
14 such special prosecutor is serving in that office or which  
15 involves the exercise of such special prosecutor's official  
16 duties, regardless of whether such special prosecutor is still  
17 serving in that office.”.

18 (b) The table of sections for chapter 3 of title 28 of  
19 the United States Code is amended by adding at the end  
20 the following item:

“49. Assignment of judges to division to appoint special prosecutors.”.

21 DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE

22 DEPARTMENT OF JUSTICE


23 SEC. 4. (a) Chapter 31 of title 28 of the United States  
24 Code is amended by adding at the end the following:

1   **"§ 528. Disqualification of officers and employees of the**  
2                   **Department of Justice**

3           "The Attorney General shall promulgate rules and regu-  
4   lations which require the disqualification of any officer or  
5   employee of the Department of Justice, including a United  
6   States attorney or a member of such attorney's staff, from  
7   participation in a particular investigation or prosecution if  
8   such participation may result in a personal, financial, or  
9   political conflict of interest, or the appearance thereof. Such  
10  rules and regulations may provide that a willful violation of  
11  any provision thereof shall result in removal from office."

12           (b) The table of sections for chapter 31 of title 28 of  
13  the United States Code is amended by adding at the end the  
14  following:

          "528. Disqualification of officers and employees of the Department of  
          Justice."



## SPECIAL PROSECUTOR ACT OF 1978

JUNE 19, 1978.—Committed to the Committee of the Whole House on the  
State of the Union and ordered to be printed

Mr. MANN, from the Committee on the Judiciary,  
submitted the following

### REPORT

together with

### ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 9705]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 9705) to amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 1, line 5, strike out "1977" and insert "1978" in lieu thereof.

Page 15, line 18, strike out "retired".

Page 15, line 19, strike out "senior".

Page 15, line 24, insert "senior or" before "retired".

Page 16, beginning in line 8, strike out "judge or justice who as a member of such division of the court" and insert in lieu thereof the following: "member of such division of the court who".

### PURPOSE OF THE LEGISLATION

The purpose of the legislation is to provide a mechanism for the court appointment of a temporary special prosecutor when necessary in order to eliminate the conflict of interest inherent when the Department of Justice must investigate and prosecute high-level executive branch officials.

## STATEMENT

Few people disagree that there are occasions when it is necessary to have a special prosecutor who is independent of the Attorney General. Investigation of possible wrongdoing by high-level executive branch officials poses special problems for the Federal criminal justice system.

The Attorney General is at the same time the chief Federal law enforcement official and a Presidential appointee who is a key member of the President's cabinet. Cases involving possible wrongdoing by high-level executive branch officials, therefore, present a fundamental institutional conflict of interest. Professor Archibald Cox, a former Watergate Special Prosecutor, has noted:

The pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.<sup>1</sup>

In addition to the public concern about the vigor and thoroughness of the investigation, however, the conflict of interest situation has another dimension. The proper exercise of discretion may require no prosecution or a plea bargain. Public acceptance of such a decision is more likely to occur if someone without a conflict of interest—such as an independent prosecutor—makes the decision. Thus, an independent special prosecutor, by being able to make hard decisions free of a conflict of interest, serves to help protect the good name and reputation of innocent persons wrongly accused of crime.

The events know collectively as "Watergate" served to underscore the need for a special prosecutor to handle cases where the Attorney General has a conflict of interest.<sup>2</sup> But the need did not originate with Watergate, and other events in other administrations also underscore the need.<sup>3</sup> During the extensive consideration that Congress has given to special prosecutor legislation in the 93d, 94th and 95th Congresses, the issue has not been whether a special prosecutor might at sometime be appropriate. Rather, the issue has been what sort of process should be relied upon to put a special prosecutor into place whenever it is necessary to have one.

<sup>1</sup> *Removing Politics from the Administration of Justice; Hearings on S. 2803 and S. 2978 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 200 (1974).

<sup>2</sup> The Watergate Special Prosecution Force reported that during its investigation it observed: "criminal abuse of power by Government officials in high places; historical growth of secrecy in the Federal executive branch unchecked by Americans and their elected Congress; unchallenged, subjective judgments by the executive branch in identifying persons and organizations that constitute an impermissible threat to the national interest and to executive policy; an undemocratic condition wherein money is power, and skillful, cynical public relations cements that power; and finally, a silent, sometimes grudging, sometimes willful conclusion by some Government representatives that ethical standards are irrelevant because quick, implementation of policy goals is mandatory, but achievable only by social and personal injustices to others." Watergate Special Prosecution Force, *Report* 134 (Oct. 1975).

<sup>3</sup> For example, the Bobby Baker incident during the Johnson administration and the Sherman Adams incident during the Eisenhower administration. See *Watergate Reorganization and Reform Act of 1975; Hearings on S. 495 and S. 2036 Before the Senate Government Operations Committee*, Part 2, 94th Cong., 1st Sess. 183 (1975-1976) (memorandum to Senator Ribicoff from David R. Schaefler and Blain B. Butler).

Congressional interests in having a special prosecutor handle litigation against high-level executive branch officials is not a recent phenomenon. The 68th Congress passed S.J. Res. 54 directing the President to appoint, with the advice and consent of the Senate, special counsel to handle Teapot Dome litigation. Public Resolution 4, Feb. 8, 1924, Ch. 16, 43 Stat. 5-6 (1924).

President Coolidge appointed Atlee Pomerene, a former Senator and a Democrat, and Owen J. Roberts, a Republican, as special counsel. Mr. Roberts later became a Justice of the Supreme Court. See B. Nogge, *Teapot Dome; Oil and Politics in the 1920's* (1962).

There are three courses of action available. The first is to do nothing. The second is to establish a permanent special prosecutor who would have power and authority comparable to that of the Attorney General. The third course of action is to establish a mechanism for appointing a special prosecutor on a temporary and ad hoc basis. The committee believes that the third course of action is the soundest and wisest choice.

Those who suggest that it is best to do nothing believe that whenever there is a problem, a solution will present itself. They point to the Watergate events as vindicating their belief.

The committee questions whether the lesson from the Watergate events is that nothing should be done. It was only through an extraordinarily fortuitous series of events that it was possible to get into place an independent special prosecutor to handle the Watergate cases.<sup>4</sup> One of those fortuitous circumstances was that the White House and the Congress were controlled by different political parties. Another was the pending confirmation of an Attorney General nominee, from whom the Senate was able to extract a promise to appoint a special prosecutor. The next time a problem arises, the Congress and the White House may not be controlled by different parties or there may not be a confirmation of an Attorney General nominee pending. It would be unrealistic and foolhardy to rely upon a recurrence of such circumstances.

The argument of those who believe that nothing should be done distills to a claim that we should trust to luck. The committee believes that this would not be a sound public policy.

The committee is also concerned that to do nothing would ignore the erosion of public confidence in our legal system that is one of the legacies of the Watergate events. As stated by the American Bar Association's Special Committee to Study Federal Law Enforcement Agencies:

[T]he public must be assured that crimes committed in high places will be investigated and prosecuted fearlessly and with integrity. This requires a basic policy decision enacted into law through legislation carefully considered by Congress.<sup>5</sup>

President Carter, in his message to Congress urging enactment of special prosecutor legislation, stressed a similar theme: "The American people must be assured that no one, regardless of position, is above the law."<sup>6</sup>

A second course of action would be to establish a permanent special prosecutor. The committee does not believe that this would be advisable, for the remedy would be worse than the illness.

The primary responsibility for enforcing Federal law should rest with the Attorney General. A permanent special prosecutor would, in effect, be a rival Attorney General. There would inevitably be tension between the Justice Department and the permanent special prosecutor over jurisdiction and the use of investigative resources. As former

<sup>4</sup> See Watergate Special Prosecution Force, *Report* 4-20 (Oct. 1975) for a history of the Watergate Special Prosecutor through October 1975. See also American Bar Association Special Committee to Study Federal Law Enforcement Agencies, *Preventing Improper Influence on Federal Law Enforcement Agencies* 86-92 (1976); Watergate Special Prosecution Force, *Final Report* 43-63 (June 1977) (chronology of Watergate events).

<sup>5</sup> American Bar Association Special Committee to Study Federal Law Enforcement Agencies, *Preventing Improper Influence on Federal Law Enforcement Agencies* 105 (1976).

<sup>6</sup> Message to the Congress Urging Enactment of the Proposed Ethics in Government Act of 1977 and Special Prosecutor Legislation, May 3, 1977, 13 Weekly Compilation of Presidential Documents 649-50.

Solicitor General Erwin N. Griswold noted, "The net result would be a continuing interference with the conduct of the executive branch of the Government which would, in due time, become intolerable."<sup>7</sup>

There is also concern about insuring adequate accountability for a permanent special prosecutor.

Much of the Watergate and preceding abuses resulted from the public's delegation of public responsibilities to powerful men whose judgments were trusted and whose claimed need for secrecy was always accepted. Men with unchecked power and unchallenged trust too often come to believe their own perceptions of priorities and the common good coincide with the national will. There is no reason to believe that, in the long run, an independent special prosecutor's office would avoid this status.<sup>8</sup>

Finally, the committee is concerned about creating a new permanent agency of government. Such an agency will tend to grow and seek to find ways to justify its growth. As noted in the Watergate Special Prosecution Force Report,

Anyone who has observed bureaucracies realizes that a "special" organization rarely retains its "special" qualities beyond a 3-year period. New organizations, large or small, start with a burst of speed, energy, imagination, enthusiasm, flexibility, long daily hours, and almost uniform high quality of personnel. That level is hardly ever maintained over a long period by a permanent organization in either the public or private sector . . . there is no reason to believe that a permanent special prosecutor's office would be immune from the rigidity that comes over most organizations after the initial period.<sup>9</sup>

The committee believes that the best course of action is to establish a mechanism for the appointment of an independent special prosecutor on a temporary and ad hoc basis. Such a mechanism would be available when needed, avoiding both the necessity to trust to luck and the drawbacks of a permanent special prosecutor. The legislation recommended by the committee represents a sensitive balancing of competing interests. The legislation assures the availability of a special prosecutor when one is needed and at the same time preserves the Justice Department's jurisdiction over, and responsibility for, all cases except those where there is an unmistakable conflict of interest. The legislation provides for impartial appointment of a special prosecutor by a panel of judges but does not involve those judges in overseeing or supervising the work of a special prosecutor. Finally, the legislation vests a special prosecutor with enough authority and independence to investigate and prosecute vigorously and thoroughly, but it also makes that special prosecutor accountable for his activities.

The mechanism recommended by the committee is triggered by a conflict of interest. That conflict is defined to occur in two situations. The first situation arises when specified high-level executive branch officials are accused of committing specified offenses related to abuse

<sup>7</sup> *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Government Operations Committee, Part 1, 94th Cong., 1st Sess. 239 (1975)*. Prior to becoming Solicitor General, Mr. Griswold was Dean of the Harvard University Law School.

<sup>8</sup> *Watergate Special Prosecution Force, Report 138 (Oct. 1975)*.

<sup>9</sup> *Id.*

of office, campaign activities, and obstruction of justice. The second situation arises when an investigation or prosecution directly and substantially affects the political interests of the President or Attorney General or the interests of the President's political party.

A special prosecutor, when needed, would be appointed by a special panel of 3 judges designated by the Chief Justice of the United States. This is essential in order to assure the fullest possible measure of independence for the special prosecutor.<sup>10</sup> The Constitution provides, in article II, section 2, clause 2, that "the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." A special prosecutor is an inferior officer within the meaning of the Constitution, and in the judgment of the Committee, vesting the appointment of a special prosecutor in a court of law is clearly constitutional.<sup>11</sup> This judgment is concurred in by the Department of Justice and the American Bar Association.<sup>12</sup>

Within his area of prosecutorial jurisdiction, a special prosecutor will have independent authority to pursue the investigation and any resulting prosecutions. However, a special prosecutor will not be left completely unaccountable; several provisions assure his proper accountability. A special prosecutor, at least annually, must report to Congress on his activities. Furthermore, the legislation expressly provides that:

The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any special prosecutor . . . and such special prosecutor shall have the duty to cooperate with the exercise of such oversight jurisdiction.

Finally, a special prosecutor can be removed from office.

The committee recognizes that by providing for the removal of a special prosecutor, there is a risk of hampering the independence of a special prosecutor. But the committee also recognizes that there must be a way to remove from office an individual who is not properly carrying out his responsibilities. Accordingly, the committee has established a removal procedure with checks upon the removal power so as not to threaten unduly the independence of a special prosecutor.

A special prosecutor can be removed, other than by impeachment, only by the Attorney General. However, the Attorney General may remove a special prosecutor only on specific grounds. An Attorney General could not, for example, remove a special prosecutor because he disagreed with that special prosecutor over the prosecutorial merits of a case or over the need to subpoena certain documents. The

<sup>10</sup> As the Supreme Court has noted, "one who holds his office during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

The history of the Watergate Special Prosecutor illustrates that, even where executive branch appointment is accompanied by strong assurances of independence and full authority, there is still a threat to a special prosecutor's independence. See *United States v. Nixon*, 418 U.S. 683 (1974), aff'g *United States v. Mitchell*, 377 F. Supp. 1326 (D.D.C. 1974); *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

<sup>11</sup> See H.R. Rept. No. 93-660, 93d Cong., 1st Sess. 7-10 (1973).

Prof. Raoul Berger of Harvard Law School has noted that, "To insist that the President must investigate and prosecute himself, for that is what the argument for executive control of prosecution boils down to, is plainly unreasonable. The power of appointment and the separation of powers were not designed to obstruct justice." Berger, "The Prosecutor," N.Y. Times, Nov. 7, 1973, at 47, col. 8.

<sup>12</sup> See Statement of Acting Assistant Attorney General John Harmon before the Subcommittee on Criminal Justice, House Committee on the Judiciary, May 18, 1977, at 8-9; *Providing for a Special Prosecutor: Hearings on H.R. 1417, H.R. 1137, H.R. 1199, H.R. 1481, H.R. 803, H.R. 1654, and Title 1 of S. 485 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 65-69 (1976) (memorandum of law submitted on behalf of the American Bar Association by Prof. Herbert B. Miller); American Bar Association Special Committee to Study Federal Law Enforcement Agencies, *Preventing Improper Influence on Federal Law Enforcement Agencies* 108 (1976).

Attorney General's removal power is further checked by judicial review. Any individual who is removed as a special prosecutor can obtain a court review of his removal. If the court finds the removal to have been in error, the individual can be reinstated as special prosecutor. The committee believes that, as checked, the Attorney General's removal power does not seriously endanger the independence of a special prosecutor.

As noted by the American Bar Association's Special Committee to Study Federal Law Enforcement Agencies, "The issue is not whether a special prosecutor is needed, but rather how, under what circumstances, under what authority, and at what time a special prosecutor should be activated."<sup>13</sup> The legislation recommended by the committee has been carefully drafted to deal with those important issues. The committee believes that the legislation is sound and workable and will help restore confidence in the Federal criminal justice system.

#### SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

H.R. 9705 contains four sections. The first section sets forth the short title of the bill. The second section adds a new chapter to title 28 of the United States Code that establishes a mechanism and criteria for the appointment and removal of special prosecutors and for terminating the office of a special prosecutor. The third section of the bill establishes a panel of judges to appoint special prosecutors. The fourth section of the bill requires the Attorney General to promulgate regulations calling for the disqualification of Justice Department officials from participating in prosecutions where they may have a conflict of interest.

##### *Section 1*

Section 1 of H.R. 9705 provides that the short title of the bill is the "Special Prosecutor Act of 1977." The committee has reported an amendment, technical in nature, to change the short title to the "Special Prosecutor Act of 1978."

##### *Section 2*

Section 2(a) of the bill adds a new chapter, entitled "Special Prosecutor", to title 28 of the United States Code. This new chapter defines those situations in which the temporary special prosecutor mechanism will take effect and establishes procedures for appointing, defining the jurisdiction and authority of, and removing a special prosecutor. It also sets forth reporting requirements for a special prosecutor, outlines congressional oversight responsibilities, defines a special prosecutor's relationship with the Justice Department, and provides a termination date for the entire special prosecutor mechanism. The new chapter of title 28, United States Code, is divided into 8 new sections, 591 through 598.

Section 591, "Applicability of provisions of this chapter," deals with the circumstances in which, and the individuals to whom, the temporary special prosecutor mechanism applies. It requires the Attorney General to conduct an investigation whenever he receives specific information<sup>14</sup> that any of the officials named in section 591(b) has violated any of the Federal criminal laws specified in section 591(a).

<sup>13</sup> American Bar Association Special Committee to Study Federal Law Enforcement Agencies, *Preventing Improper Influence on Federal Law Enforcement Agencies* 104 (1976).

<sup>14</sup> The term "specific information" is used to indicate that general statements, such as "X is a crook," without any specific factual support or potential evidence, does not trigger the mechanism.

The executive branch officials specified in section 591(b) are: (1) the President and Vice President; (2) individuals serving in cabinet-level positions; (3) senior White House staff persons; (4) the Deputy Attorney General, Associate Attorney General, Solicitor General, Director of the Federal Bureau of Investigation, Administrator of the Law Enforcement Assistance Administration, all Assistant Attorneys General,<sup>15</sup> the Director and Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue; (5) any person who held any position listed above during the incumbency of the President or of the previous President, if that President was of the same political party;<sup>16</sup> and (6) a national campaign manager or chairman of a national campaign committee.

The Federal criminal laws specified in section 591(a) involve abuse of office; the financing and conduct of elections and election campaigns; and obstruction of justice, perjury, and conspiracy to obstruct justice, commit perjury or defraud the United States.

Section 592, "Determination whether to apply for appointment of a special prosecutor," describes what action the Justice Department must take upon receipt of specific information that one of the officials named in section 591 has violated one of the Federal criminal laws specified in section 591.

Upon receipt of such information, the Justice Department must begin a preliminary investigation,<sup>17</sup> which may last for up to 60 days. After the preliminary investigation, if the Justice Department determines that the matter is so unsubstantiated that no further investigation is warranted, the Attorney General must so notify the court.<sup>18</sup> In such instances, no special prosecutor would be appointed.<sup>19</sup> If the Justice Department determines that the matter warrants further investigation or prosecution, or if 60 days elapse without the Justice Department making a determination one way or the other, the Attorney General must apply to the court for the appointment of a special prosecutor.<sup>20</sup>

After determining that a matter is so unsubstantiated that it does not warrant further investigation or prosecution and after so notifying

<sup>15</sup> An Assistant Attorney General is in charge of each of the following parts of the Justice Department: Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Land and Natural Resources Division, Office for Improvements in the Administration of Justice, Office of Legal Counsel, Office of Legislative Affairs, Office of Management and Finance, and Tax Division.

<sup>16</sup> A situation may arise where an allegation is made against a covered official during the last days of an administration, and the next administration will be that of a different political party. If the preliminary investigation of the allegation is not completed until after the new administration takes over, then the special prosecutor mechanism would not be triggered. The type of conflict of interest addressed by this legislation would not necessarily exist where an Attorney General in one administration assesses the case against a high level executive branch official of the previous administration, as long as the previous administration is that of a different political party.

<sup>17</sup> The term "preliminary investigation" is intended to describe the kind of initial investigation currently undertaken by the Justice Department when it receives allegations of criminal misconduct. See U.S. Attorneys Manual § 8-3.210 (Memorandum of March 11, 1971, from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to J. Edgar Hoover, Director, Federal Bureau of Investigation).

<sup>18</sup> The notice to the court must contain a summary of the information received and a summary of the results of the preliminary investigation. The notice cannot be made public without the permission of the court.

<sup>19</sup> This provision is intended to permit the Attorney General to weed out totally frivolous allegations. Without such a provision, it would be necessary to appoint a special prosecutor to investigate every allegation, even one that is completely baseless or frivolous on its face. This provision, while it gives the Attorney General some latitude, does not undercut the basic thrust of the legislation. If there is any doubt about an allegation, the Attorney General could not report to the court that it was so unsubstantiated that no further investigation or prosecution is warranted. Furthermore, the authority given to Members of Congress in § 592(e) serves as an additional check upon the possible abuse of this authority. See p. 10 below.

<sup>20</sup> Decisions by a Federal prosecutor not to prosecute are reviewable only rarely. See *United States v. Corcoran*, 342 F.2d 167, 171 (5th Cir. 1965), cert. denied 381 U.S. 935 (1965); *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975). See generally K. C. Davis, Administrative Law § 28.06 (3d ed. 1972).

<sup>21</sup> The application for the appointment of a special prosecutor must contain sufficient information to assist the court in selecting a special prosecutor and in defining that special prosecutor's area of jurisdiction. The application cannot be made public without the permission of the court.

the court, the Justice Department may receive additional specific information about the matter. The Justice Department then has 60 days in which to conduct an appropriate additional investigation. If after that the Justice Department determines that the matter warrants further investigation or prosecution, then the Attorney General must apply to the court for the appointment of a special prosecutor.

Section 592(c)(3) establishes a second standard for the appointment of a temporary special prosecutor. It directs the Attorney General to apply to the court for the appointment of a special prosecutor whenever the Attorney General determines that an investigation or prosecution or the result of either,

may so directly and substantially affect the political or personal interests of the President or the Attorney General, or the interests of the President's political party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such investigation . . . .

This provision applies to any investigation of any person for any possible violation of Federal criminal law. It is not limited to the offenses described in section 591(a) or the persons specified in section 591(b).

Section 592(e) authorizes the Attorney General to ask a special prosecutor to accept the referral of other matters related to a "matter within that special prosecutor's prosecutorial jurisdiction." Section 594, which is discussed below, authorizes a special prosecutor to accept such a referral.

Section 593, "Duties of the division of the court," sets forth the role and function of the court in the appointment and removal of temporary special prosecutors and in the termination of an office of special prosecutor.

Section 593(a) specifies that the court involved is a division of the United States Court of Appeals for the District of Columbia Circuit that is established by section 3 of the legislation.

Section 593(b) authorizes the court, upon receipt of an application filed in accordance with section 592, to appoint an appropriate special prosecutor and define his prosecutorial jurisdiction. Upon the request of the Attorney General or upon a determination by the court that it serves the best interests of justice, the identity and prosecutorial jurisdiction of a special prosecutor must be made public. In any event, the special prosecutor's identity would be made public at the time any information was filed or indictment returned.

Section 593(c) authorizes the court, upon the request of the Attorney General, to expand the jurisdiction of any special prosecutor. The court is permitted to do this in lieu of appointing an additional special prosecutor. This is intended to give the court flexibility in appointing special prosecutors. It may be advisable to assign a matter to an existing special prosecutor because he is working on a similar or related matter or because it would be economical.

Section 593(d) precludes the court from appointing as a special prosecutor any person holding any office of profit or trust under the United States.

Section 593(e) establishes procedures for replacing a special prosecutor. If a special prosecutor resigns or dies while holding office, the court

may appoint a successor to complete the work of the office. If a special prosecutor is removed from office by impeachment and conviction or by the personal action of the Attorney General,<sup>21</sup> the court can appoint an interim successor. The appointment is only interim because the legislation permits a removed special prosecutor to obtain judicial review of his removal.<sup>22</sup> After such a review, the court will either reinstate the original special prosecutor or will appoint a permanent successor.

Section 594, "Authority and duties of a special prosecutor," outlines the powers and obligations of a special prosecutor. Section 594(a) provides that, with regard to matters within the special prosecutor's prosecutorial jurisdiction, a special prosecutor has full power and independent authority to exercise all the investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and officers of the Department of Justice, except with respect to matters specifically requiring the Attorney General's personal action under section 2516 of title 18, United States Code.<sup>23</sup>

Section 594(b) provides that a special prosecutor will be compensated on a per diem basis at a rate of pay equal to level IV of the Executive Schedule.<sup>24</sup> Section 594(c) authorizes a special prosecutor to hire and fix the compensation of such persons as are necessary to operate his office. However, no employee may be paid at a rate in excess of the maximum provided for level GS-18.<sup>25</sup>

Section 594(d) requires that the Justice Department, upon the request of a special prosecutor, must provide that special prosecutor with assistance in the form of access to files, records and materials relevant to matters within the special prosecutor's jurisdiction. When requested, the Justice Department must also furnish the special prosecutor with resources and personnel needed by the special prosecutor in order to perform his duties.

Section 594(e) authorizes a special prosecutor to accept matters referred to him by the Attorney General provided that they relate to matters within his prosecutorial jurisdiction as established by the court.

Section 595, "Reporting and congressional oversight," establishes reporting requirements for a special prosecutor and spells out congressional oversight responsibilities.

Section 595(a) requires a special prosecutor to report to Congress at least annually. It also authorizes a special prosecutor to issue such other reports or statements that the special prosecutor deems appropriate.

Section 595(b) requires a special prosecutor to submit a final report to the court before the conclusion of his duties. This report must fully and completely describe his work, including the disposition of all cases brought and the reasons for not prosecuting any matter within his prosecutorial jurisdiction. The court may release to the Congress, the

<sup>21</sup> See discussion of section 596(a), pp. 10-11 below.

<sup>22</sup> *Id.*

<sup>23</sup> 18 U.S.C. §2516 requires the Attorney General, or an Assistant Attorney General specially designated by him, to authorize the filing of every application to a Federal judge for a wiretap order.

This limitation upon the authority of a special prosecutor represents a balancing of the special prosecutor's need to use wiretaps during the course of his work, which is likely to be limited, with the policy of strictly controlling the use of wiretaps by assigning to the Attorney General, or an Assistant Attorney General that he designates, the responsibility of approving applications for wiretap orders. The committee does not believe that this provision will hamper to any significant degree the ability of a special prosecutor to carry out his responsibilities fully and completely.

<sup>24</sup> Currently \$50,000 per year. Thus, a special prosecutor will receive the same rate of pay as an Assistant Attorney General.

<sup>25</sup> Currently \$47,500.

public or any appropriate person such portions of the final report as it deems appropriate. The court may give persons named in the report an opportunity to submit comments, and these comments may be included as an appendix to the report. The court is also authorized to issue appropriate orders to protect the rights of persons named in the report and to prevent undue interference with any pending prosecution.

The committee recognizes that a special prosecutor will possess a good deal of power and that it is important to make that special prosecutor accountable for the exercise of that power. The provisions of sections 595 (a) and (b) are intended to achieve that accountability. A special prosecutor will know that the conduct of his office will be reviewed and its work scrutinized. This should discourage, on the one hand, the overreaching of an arbitrary or overzealous special prosecutor and, on the other hand, the overcaution of a timid special prosecutor.

Section 595(c) requires a special prosecutor promptly to advise the House of Representatives of any substantial and credible information received that may constitute grounds for impeachment. It further provides that nothing in the legislation shall prevent "Congress or either House thereof from obtaining information in the course of an impeachment proceeding."

Section 595(d) provides that the appropriate committees of Congress shall have oversight jurisdiction with respect to the activities of a special prosecutor. A special prosecutor is required to cooperate with the exercise of this oversight jurisdiction.

Section 595(e) gives members of the judiciary committees of the House and the Senate certain powers with respect to obtaining the appointment of a special prosecutor. A majority of the majority party members or a majority of all nonmajority party members may request in writing that the Attorney General apply for the appointment of a special prosecutor. The Attorney General must respond to this request within 30 days. If the Attorney General decides not to apply for the appointment of a special prosecutor, he must explain why he decided not to. The Attorney General's response may not be made public except to the extent that the appropriate committee, on its own or at the Attorney General's request, decides to make public such portions of the response as will not, in the committee's judgment, prejudice the rights of any individual.

Section 596, "Removal of a special prosecutor; termination of office," deals with the procedure and standards for removing a special prosecutor and describes how an office of special prosecutor is terminated.

Section 596(a) provides that a special prosecutor may be removed, other than by impeachment and conviction, only by the personal action of the Attorney General and only for "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties." If a special prosecutor is removed from office, the Attorney General must submit to the court and to the judiciary committees of Congress a report specifying the facts and the ultimate ground for

the removal.<sup>26</sup> A special prosecutor removed by the Attorney General may obtain judicial review of his removal by means of a civil action to determine if his removal was based upon an error of law or fact.<sup>27</sup> If it was, the court may order reinstatement of the removed special prosecutor or other appropriate relief.

Section 596(b) sets forth 2 ways in which an office of special prosecutor can be terminated. First, an office of special prosecutor will terminate when a special prosecutor notifies the Attorney General that the investigation and prosecution of all matters within his prosecutorial jurisdiction have been completed or so substantially completed as to make it appropriate for the Justice Department to complete the remaining matters.<sup>28</sup> Second, an office of special prosecutor will terminate if the court, on its own motion or at the suggestion of the Attorney General, determines that the investigation and prosecution of all matters within a special prosecutor's prosecutorial jurisdiction have been completed or so substantially completed that it would be appropriate for the Justice Department to finish the remaining matters. The second method of terminating an office of special prosecutor is intended to deal with situations where a special prosecutor is attempting to prolong his office beyond the time it is really needed.

Section 597, "Relationship with Department of Justice," requires in subsection (a) that the Justice Department suspend all investigations and proceedings on matters within a special prosecutor's jurisdiction. Section 597(b) permits the Attorney General or Solicitor General to make a presentation as *amicus curiae* with regard to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity.

Section 598, "Termination of effect of chapter," is in essence a sunset provision for the special prosecutor mechanism. It provides that new chapter 39 of title 28, United States Code, expires 5 years after the enactment of this legislation, except as to the completion of matters then pending with a special prosecutor if that special prosecutor determines that he ought to complete those matters. With respect to pending matters, then, chapter 39 will continue in effect until the special prosecutor makes a determination that the investigation and prosecution of those matters has been completed. The purpose of this provision is to enable the Congress to review how the legislation has operated in order to determine whether the mechanism should be retained or changed.

<sup>26</sup> As with reports called for in other provisions of the legislation, this report may be released. However, the committees or the court may decide to withhold all or any part of it.

By requiring the Attorney General to specify the *ultimate ground* for removal, the legislation requires the Attorney General to list in his report the statutory reason for removing the special prosecutor—extraordinary impropriety, physical disability, mental incapacity, or other condition that substantially impairs the special prosecutor's performance of duties. By requiring the Attorney General to specify the *facts found*, the legislation requires the Attorney General to spell out the facts that lead him to the conclusion of extraordinary impropriety, physical disability, mental incapacity, or other condition that substantially impairs the special prosecutor's performance of duties.

<sup>27</sup> This standard gives the court a greater degree of latitude in overturning a decision to remove a special prosecutor than it ordinarily has in reviewing other similar administrative decisions. See generally K. C. Davis, *Administrative Law* §§ 29.01-.07 (3d ed. 1972).

The committee believes that this is an important check upon the possible abuse of the removal power by an Attorney General. The committee recognizes that it is constitutionally permissible for it to vest the removal power exclusively in the appointing court. See H.R. Rept. No. 93-600, 93d Cong., 1st Sess. 10-11 (1973). However, the committee believes that the preferred course at present is to permit Attorney General removal but to provide adequate safeguards against the abuse of the removal power.

<sup>28</sup> In such a situation, however, the office actually terminates only after the special prosecutor files the final report required by § 595(a). See discussion above, p. 9.

Section 2(b) of the legislation amends the table of chapters for title 28 of the United States Code to show the addition of new chapter 39. Section 2(c) of the legislation authorizes the appropriation of such sums as are necessary to carry out the provisions of new chapter 39 of title 28, United States Code.

#### *Section 3*

Section 3(a) of the legislation adds a new section, entitled "Assignment of judges to division to appoint special prosecutors," to chapter 3 of title 28, United States Code. The new section establishes a special division of the United States Court of Appeals for the District of Columbia Circuit to appoint and define the prosecutorial jurisdiction of special prosecutors. It authorizes the Chief Justice of the United States to assign 3 judges to serve on the division for 2 year terms. In making assignments to the division the Chief Justice is to give preference to senior circuit judges and retired justices.<sup>29</sup> One of the judges chosen must be from the United States Court of Appeals for the District of Columbia Circuit, but not more than one judge from any one court may be named to the division.<sup>30</sup> This is intended to give the division a more national makeup.

Section 3(b) amends the table of sections for chapter 3 of title 28, United States Code, to show the new section added by the legislation.

#### *Section 4*

Section 4(a) of the legislation adds a new section, entitled "Disqualification of officers and employees of the Department of Justice," to chapter 31 of title 28, United States Code. It requires the Attorney General to issue rules and regulations requiring an officer or employee of the Justice Department, including a United States attorney or assistant United States attorney, to disqualify himself from involvement in any investigation or prosecution where such involvement could result in a personal, financial or political conflict of interest, or the appearance of such a conflict. It also states that these rules or regulations may provide that a willful violation shall result in removal from office.

Section 4(b) amends the table of sections for chapter 31 of title 28, United States Code, to show the new section being added by the legislation.

#### **COST**

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, the committee, adopting as its own the following cost estimate of the Congressional Budget Office, estimates no significant costs to the government would be incurred as a result of the enactment of this legislation.

<sup>29</sup> The bill now refers to "senior retired circuit judges" and "senior retired justices." A committee amendment, which is technical in nature, changes the references to "senior circuit judges" and "retired justices". A retired justice or a senior circuit judge is free to accept or decline the assignment to the division. 28 U.S.C. § 204.

<sup>30</sup> As used in this context, "court" does not include a U.S. District Court or any of the specialized courts. Thus, the division of the U.S. Court of Appeals for the District of Columbia Circuit will be composed of active or senior circuit judges or retired Supreme Court justices.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, D.C., May 16, 1978.

HON. PETER W. RODINO, JR.,  
Chairman, Committee on the Judiciary,  
House of Representatives,  
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 9705, the Special Prosecutor Act of 1978, as ordered reported by the House Committee on the Judiciary, May 16, 1978.

In the past, the Department of Justice has included the cost of a special prosecution as a separate line item in the annual budget of the U.S. Government. In cases where a special investigation was conducted without assigning a special prosecutor, the Department of Justice has allocated departmental resources to perform necessary investigating and legal activities. It is therefore likely that most of the cost of a special prosecutor appointed under the provisions of this act will be offset by savings realized by the Department of Justice. Based on this review, it is estimated that no significant costs to the Government would be incurred as a result of enactment of this bill.

Should the committee so desire, we would be pleased to provide further details on this cost estimate.

Sincerely,

C. G. NUCKOLS  
(For Alice M. Rivlin,  
Director).

## STATEMENT OF THE BUDGET COMMITTEE

No statement on this legislation has been received from the House Committee on the Budget.

## STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement on this legislation has been received from the House Committee on Government Operations.

## INFLATION IMPACT STATEMENT

H.R. 9705 will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

## OVERSIGHT

The committee makes no oversight findings.

## COMMITTEE VOTE

H.R. 9705 was reported out of committee on Tuesday, May 16, 1978, by a vote of 24-6.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

## TITLE 28, UNITED STATES CODE

|                                |   |   |   |   |   |   |      |
|--------------------------------|---|---|---|---|---|---|------|
| *                              | * | * | * | * | * | * | *    |
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## Part II—DEPARTMENT OF JUSTICE

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## Chapter 3.—COURT OF APPEALS

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| *   | * | * | * | * | * | * | * |

§ 49. *Assignment of judges to division to appoint special prosecutors*

(a) *Beginning with the two-year period commencing on the date of the enactment of this section three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purposes of chapter 39 of this title.*

(b) *Except as provided under subsection (f) of this section, assignment to such division of the court shall not be a bar to other judicial assignments during the term of such division.*

(c) *In assigning judges or justices to sit on such division of the court, priority shall be given to senior retired circuit judges and senior retired justices.*

(d) *The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia, to such division of the court. Not more than one judge or justice or retired judge or justice may be named to such division from a particular court.*

(e) Any vacancy in such division of the court shall be filled only for the remainder of the two-year period in which such vacancy occurs and in the same manner as initial assignments to such division were made.

(f) Except as otherwise provided in chapter 39 of this title, no judge or justice who as a member of such division of the court participated in a function conferred on the division under chapter 39 of this title involving a special prosecutor shall be eligible to participate in any judicial proceeding concerning a matter which involves such special prosecutor while such special prosecutor is serving in that office or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office.

\* \* \* \* \*

### Chapter 31.—THE ATTORNEY GENERAL

Sec.

\* \* \* \* \*

528. Disqualification of officers and employees of the Department of Justice.

\* \* \* \* \*

#### § 528. Disqualification of officers and employees of the Department of Justice

The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.

\* \* \* \* \*

### Chapter 39.—SPECIAL PROSECUTOR

Sec.

- 591. Applicability of provisions of this chapter.
- 592. Determination whether to apply for appointment of a special prosecutor.
- 593. Duties of the division of the court.
- 594. Authority and duties of a special prosecutor.
- 595. Reporting and congressional oversight.
- 596. Removal of a special prosecutor; termination of office.
- 597. Relationship with Department of Justice.
- 598. Termination of effect of chapter.

#### § 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has—

(1) violated any Federal criminal law involving the abuse of Federal office;

(2) violated any Federal criminal law regulating the financing or conduct of elections or election campaigns; or

(3) violated any Federal criminal law relating to the obstruction of justice or perjury, or conspired to violate any such Federal criminal law or to defraud the United States.

(b) *The persons referred to in subsection (a) of this section are—*

- (1) *the President and Vice President;*
- (2) *any individual serving in a position listed in section 5312 of title 5;*
- (3) *any individual working in the Executive Office of the President and compensated at a rate not less than the rate provided for level IV of the Executive Schedule under section 5315 of title 5;*
- (4) *any individual working in the Department of Justice and compensated at a rate not less than the rate provided for level III of the Executive Schedule under section 5314 of title 5; any assistant attorney general; the Director of Central Intelligence; the Deputy Director of Central Intelligence; and the Commissioner of Internal Revenue;*
- (5) *any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and*
- (6) *a national campaign manager or chairman of any national campaign committee seeking the election or reelection of the President.*

**§ 592. Determination whether to apply for appointment of a special prosecutor**

(a) *The Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title has engaged in conduct described in section 591(a) of this title, shall conduct, for a period not to exceed sixty days, such preliminary investigation of the matter as the Attorney General deems appropriate.*

(b)(1) *If the Attorney General, upon completion of the preliminary investigation, finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a special prosecutor.*

(2) *Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.*

(3) *Such memorandum shall not be revealed to any third party without leave of the division of the court.*

(c)(1) *If the Attorney General, upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution, or if sixty days elapse from the receipt of the information without a determination by the Attorney General that the matter is so unsubstantiated as not to warrant further investigation or prosecution, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor.*

(2) *If—*

(A) *after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional specific information about the matter to which such memorandum related; and*

(B) *the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that such information warrants further investigation or prosecution;*

then the Attorney General shall, not later than sixty days after receiving such additional information, apply to the division of the court for the appointment of a special prosecutor.

(3) If, in the course of any Federal criminal investigation, the Attorney General determines that the continuation of the investigation or that any resulting prosecution may so directly and substantially affect the political or personal interests of the President or the Attorney General or the interests of the President's political party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such investigation, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor.

(d)(1) Any application under this chapter shall contain sufficient information to assist the division of the court to select a special prosecutor and to define that special prosecutor's prosecutorial jurisdiction.

(2) No application under this chapter shall be revealed to any third party without leave of the division of the court.

(e) The Attorney General may ask a special prosecutor to accept referral of a matter that relates to a matter within that special prosecutor's prosecutorial jurisdiction.

### **§ 593. Duties of the division of the court**

(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate special prosecutor and shall define that special prosecutor's prosecutorial jurisdiction. A special prosecutor's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such special prosecutor would be in the best interests of justice.

(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing special prosecutor, and such expansion may be in lieu of the appointment of an additional special prosecutor.

(d) The division of the court may not appoint as a special prosecutor any person who holds any office of profit or trust under the United States.

(e) If a vacancy in office arises by reason of the resignation or death of a special prosecutor, the division of the court may appoint a special prosecutor to complete the work of the special prosecutor whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of a special prosecutor, the division of the court may appoint an acting special prosecutor to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

### **§ 594. Authority and duties of a special prosecutor**

(a) Notwithstanding any other provision of law, a special prosecutor appointed under this chapter shall have, with respect to all matters in such special prosecutor's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative

and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18.

(b) A special prosecutor appointed under this chapter shall receive compensation at a per diem rate equal to the rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of special prosecutor, a special prosecutor shall have power to appoint, fix the compensation, and assign the duties of such employees as such special prosecutor deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

(d) A special prosecutor may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such special prosecutor's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such special prosecutor's duties.

(e) A special prosecutor may accept referral of a matter by the Attorney General, if the matter relates to a matter within the prosecutorial jurisdiction established by the division of the court.

#### **§ 595. Reporting and congressional oversight**

(a) A special prosecutor appointed under this chapter may make public from time to time, and shall send to the Congress at least annually, statements or reports on the activities of such special prosecutor. These statements and reports shall contain such information as that special prosecutor deems appropriate.

(b)(1) In addition to any reports made under subsection (a) of this section, and before the termination of a special prosecutor's office under section 596(b) of this title, such special prosecutor shall submit to the division of the court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the special prosecutor, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such special prosecutor which was not prosecuted.

(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

(c) *A special prosecutor shall promptly advise the House of Representatives of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.*

(d) *The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any special prosecutor appointed under this chapter, and such special prosecutor shall have the duty to cooperate with the exercise of such oversight jurisdiction.*

(e) *A majority of majority party members or a majority of all non-majority party members of a judiciary committee of either House of the Congress may request in writing that the Attorney General apply for the appointment of a special prosecutor under this chapter. Not later than thirty days after the receipt of such a request, the Attorney General shall provide written notification of any action the Attorney General has taken under this chapter in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.*

#### **§ 596. Removal of a special prosecutor; termination of office**

(a)(1) *A special prosecutor appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties.*

(2) *If a special prosecutor is removed from office, the Attorney General shall promptly submit to the division of the court and the judiciary committees of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to avoid prejudicing the interests of the United States or of any individual, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 525(b)(3) of this title and under the same limitations as apply to the release of a report under that section.*

(3) *A special prosecutor so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.*

(b)(1) *An office of special prosecutor shall terminate when (A) the special prosecutor notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such special prosecutor or accepted by such special prosecutor under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially*

completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the special prosecutor files a report in full compliance with section 595(b) of this title.

(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of special prosecutor at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the special prosecutor or accepted by such special prosecutor under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.

#### **§ 597. Relationship with Department of Justice**

(a) Whenever a matter is in the prosecutorial jurisdiction of a special prosecutor or has been accepted by a special prosecutor under section 594(e) of this title, the Department of Justice, the Attorney General, and all other offices and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity or any appeal of such a case or proceeding.

#### **§ 598. Termination of effect of chapter**

This chapter shall cease to have effect five years after the date of the enactment of this chapter, except that this chapter shall continue in effect with respect to then pending matters before a special prosecutor that in the judgment of such special prosecutor require such continuation until that special prosecutor determines such matters have been completed.

\* \* \* \* \*

## ADDITIONAL VIEWS OF HON. ELIZABETH HOLTZMAN

I support H.R. 9705, the Special Prosecutor bill, and have worked hard for its passage for the past four years. As Watergate demonstrates, the Department of Justice, which is controlled by the President's appointee, cannot always be relied on to conduct a full and independent investigation of executive branch officials accused of criminal wrongdoing.

The bill recognizes this, but it takes the unrealistic position that the Justice Department will never be politically inhibited when it investigates Members of Congress. The Korean investigation is an obvious example of a case involving Members of Congress in which the Department has not done its job as rigorously as we would have wished.

I do not believe that there can be any compromise with the principle that Members of Congress, like executive branch officials, should be held strictly accountable under the law. There can be no justice when there is a dual system of laws—one for the high and mighty and one for everyone else.

ELIZABETH HOLTZMAN.

DISSENTING VIEWS OF MESSRS. WIGGINS, McCLORY,  
BUTLER, MOORHEAD OF CALIFORNIA, AND KINDNESS  
ON H.R. 9705

H.R. 9705 requires unquestioning acceptance of several questionable premises. First, one must agree that a 189-year-old system—that of centralized responsibility for enforcing all the country's laws—is inherently defective. Secondly, one is asked to concede there is a national perception of this defect. Finally, one is required to embrace the specifics of the bill's proposed solution.

We believe that in creating three separate branches of Government, the Founding Fathers devised a remarkable administrative mechanism. Without question, the Founders foresaw that each branch would at some time be in the unavoidable position to influence its own interests, either institutional or personal. They knew Congress would vote on its own salary, judges would decide cases granting more power to the judiciary, and that the executive branch would enforce all laws, even against executive officers. Therefore, they interwove checks and balances so that each branch was accountable to another and tensed the entire system by ultimate accountability to the electorate. The result has been so successful that we feel it pointless to tinker with it.

To argue that the executive is so inherently untrustworthy simply lacks persuasive logic. The answer to this first proposition is that existing constitutional checks and balances sufficiently insure proper functioning of the Government. If an Attorney General cannot be trusted to enforce the law against the Executive, the remedy is impeachment and not the cloning of an additional Attorney General to do the job of the first. The latter course embarks upon a misbegotten path lined with real possibilities for duplication and a lack of accountability we fear to tempt.

Next, proponents of H.R. 9705 argue that it satisfies a widespread public discontent with the status quo, a discontent arising from the Watergate experience. However, during Watergate, two Attorneys General, a Vice President, and numerous high executive officials were convicted of crimes, and congressional resort to impeachment brought about a Presidential resignation—all without H.R. 9705. Far from failing, the Government proved itself so conspicuously effective that we cannot accept the misreading of public perception which underlies H.R. 9705's second premise.

Even granting these first two propositions, one must still adopt a proposed solution that is demonstrably ineffective. The bill permits the Attorney General 60 days to investigate charges against high executive officials, including himself, after which he is to decide whether these charges warrant further investigation or prosecution. If he decides further action is warranted, he must apply to a special court panel for the appointment of a special prosecutor.

However, both the Attorney General and the President already have the power to appoint a special prosecutor and have exercised it numerous times to investigate or prosecute executive wrongdoing. Although the appointment of a special prosecutor during the Teapot Dome scandal was the most famous instance prior to Watergate, special prosecutors were also appointed during the Truman and Grant administrations.

To prepattern the exercise of this power with a "trigger mechanism" assumes that this Congress can anticipate all instances in which the Attorney General should not and would not prosecute with objectivity and zeal. The existence of an independent prosecutor is so extraordinary that it should occur only in cases of considerable magnitude and sensitivity and these are unforeseeable. However, H.R. 9705 promises that not a month would go by without the appointment of still another special prosecutor accompanied by progressive trivialization of a process which has served us so well in cases of genuine need.

In formulating its supposed cure, the bill becomes so infected with practical problems that its utility is largely academic. Just the following few questions from an endless litany emphasize that H.R. 9705 would institutionalize confusion. What constitutes "specific information" of criminal activities? When can the Attorney General be charged with receipt of this information? Can he be trusted to investigate allegations relating to himself? What criminal laws involve "abuse of Federal office"? What if the Attorney General improperly decides that a matter does not warrant further action? How many special prosecutors are likely to be appointed?

Since the Attorney General's decision not to apply for the appointment of a special prosecutor entails the exercise of discretion, mandamus would not lie to compel that discretion be exercised in any particular manner. Even in those instances where the Attorney General's actions under H.R. 9705 are arguably ministerial (applying for a special prosecutor when he comes to no decision within sixty days), there would likely be no one with standing to seek mandamus. Although the House or Senate Judiciary Committees, in whole or in part, may request the Attorney General to appoint a special prosecutor, H.R. 9705 creates no more power to enforce that request than now exists.

Since neither court nor Congress can force the Attorney General to apply for a special prosecutor if he chooses not, this bill merely engages in cosmetic convolutions which return us to the point of origin. No more protection than currently exists is offered against the untrustworthy Attorney General.

Moreover, these objections have so far been based only upon disagreement with the policy of H.R. 9705 and criticism of how this policy is implemented. We have ignored the question of whether a court may constitutionally appoint a special prosecutor under the separation of powers doctrine. Suffice it to say that this is a question of considerable importance for which there is no unanimity of judicial or academic opinion. However the judiciary decides this issue, it will surely involve the Congress, courts, and the Department of Justice in an extensive and useless imbroglio.

Although packaged as a corruption combattant, H.R. 9705 in reality is a device for delay. Instead of encouraging the Attorney General to act with dispatch in weeding out wrongdoing, the bill requires a time-consuming pass off of responsibility.

Like too many bills we have seen in this Congress, H.R. 9705 prescribes an illusory remedy for an illusory problem. It deludes the American people into believing that we have acted to stamp out corruption when in fact we have not.

Far from a noble enterprise, the bill represents congressional abdication of its duty to scrutinize how well justice is being administered by the executive branch. When talk of corruption grips the Nation, it may seem safer for Congress to assign this duty to a remote and unaccountable figure. But this only indicates that responsibility is more easily abdicated than exercised.

For these reasons, we respectfully dissent.

CHARLES E. WIGGINS.

ROBERT McCLORY.

M. CALDWELL BUTLER.

CARLOS J. MOORHEAD.

THOMAS N. KINDNESS.

APPENDIX 5

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The Senate included Special Prosecutor provisions in S. 555, which it passed on June 27, 1977.

95TH CONGRESS  
1ST SESSION

**S. 555**

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**IN THE SENATE OF THE UNITED STATES**

JULY 28 (legislative day, JULY 19), 1977

Ordered to be printed as passed

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**AN ACT**

To establish certain Federal agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions, and for other purposes.

- 1      *Be it enacted by the Senate and House of Representa-*
- 2      *tives of the United States of America in Congress assembled,*
- 3      That this Act may be cited as the "Public Officials Integrity
- 4      Act of 1977".

1 TITLE I—AMENDMENTS TO TITLE 28, UNITED  
2 STATES CODE

3 SPECIAL PROSECUTOR

4 SEC. 101. (a) Title 28 of the United States Code is  
5 amended by inserting immediately after chapter 37 the fol-  
6 lowing new chapter:

7 **“Chapter 39.—SPECIAL PROSECUTOR**

“Sec.

“591. Applicability of provisions of this chapter.

“592. Application for appointment of a special prosecutor.

“593. Duties of the division of the court.

“594. Authority and duties of a special prosecutor.

“595. Reporting and congressional oversight.

“596. Removal of a special prosecutor; termination of office.

“597. Relationship with Department of Justice.

“598. Termination of effect of chapter.

8 **“§ 591. Applicability of provisions of this chapter**

9 “(a) The Attorney General shall conduct an investiga-  
10 tion pursuant to the provisions of this chapter whenever the  
11 Attorney General receives specific information that any of  
12 the persons described in subsection (b) of this section may  
13 have violated any Federal criminal law other than a viola-  
14 tion constituting a petty offense.

15 “(b) The persons referred to in subsection (a) of this  
16 section are—

17 “(1) The President or Vice President.

18 “(2) Any individual serving in a position listed in  
19 section 5312 of title 5.

20 “(3) Any individual working in the Executive  
21 Office of the President and compensated at a rate not less

1       than the rate provided for level IV of the Executive  
2       Schedule under section 5315 of title 5.

3       “(4) Any individual working in the Department of  
4       Justice and compensated at a rate not less than the rate  
5       provided for level III of the Executive Schedule under  
6       section 5314 of title 5; any assistant attorney general  
7       involved in criminal law enforcement; the Director of  
8       Central Intelligence; the Deputy Director of Central  
9       Intelligence; and the Commissioner of Internal Revenue.

10       “(5) Any individual who held any office or position  
11       described in any of paragraphs (1) through (4) of this  
12       subsection during the term of the President in office on  
13       the date the Attorney General receives the information  
14       under subsection (a) (hereafter in this subsection re-  
15       ferred to as the ‘incumbent President’) or during the  
16       period during which the President immediately preced-  
17       ing such incumbent President held office, if such pre-  
18       ceding President was of the same political party as the  
19       incumbent President.

20       “(6) A national campaign manager or chairman of  
21       any national campaign committee seeking the election or  
22       reelection of the President.

23       “(7) For the purposes of section 592(i) of this  
24       title, a Representative or Senator in the Congress of the  
25       United States.

1   **"§ 592. Application for appointment of a special prosecutor**

2       “(a) The Attorney General, upon receiving specific in-  
3 formation that any of the individuals described in section  
4 591 (b) may have violated any Federal criminal law other  
5 than a violation constituting a petty offense, shall conduct,  
6 for a period not to exceed ninety days, such preliminary in-  
7 vestigation of the matter as the Attorney General deems ap-  
8 propriate. The Attorney General, upon notifying in writing  
9 the division of the court specified in section 593 (a) (herein-  
10 after referred to as the ‘division of the court’) of the need  
11 for additional time to complete a preliminary investigation  
12 and the reasons why additional time is needed, shall have  
13 thirty days to complete such preliminary investigation.

14       “(b) (1) If the Attorney General, upon completion of  
15 the preliminary investigation, finds that the matter is so  
16 unsubstantiated that no further investigation or prosecution  
17 is warranted, the Attorney General shall so notify the divi-  
18 sion of the court and the division of the court shall have no  
19 power to appoint a special prosecutor.

20       “(2) The notification by the Attorney General of the  
21 division of the court shall be by memorandum containing a  
22 summary of the information received and a summary of the  
23 results of any preliminary investigation.

24       “(3) Such memorandum shall not be revealed to any

1 individual outside the court or the Department of Justice  
2 without leave of the division of the court.

3 “(c) (1) If the Attorney General, upon completion of  
4 the preliminary investigation, finds that the matter warrants  
5 further investigation or prosecution, or if ninety days (one  
6 hundred and twenty days in the case of an extension) elapse  
7 from the receipt of the information without a determination  
8 by the Attorney General that the matter is so unsubstantiated  
9 as to not warrant further investigation or prosecution, then  
10 the Attorney General shall apply to the division of the court  
11 for the appointment of a special prosecutor.

12 “(2) Each application for the appointment of a special  
13 prosecutor shall contain sufficient information to enable the  
14 division of the court to select a special prosecutor and to define  
15 that special prosecutor’s prosecutorial jurisdiction.

16 “(3) Such application shall not be revealed to any  
17 individual outside the court or the Department of Justice  
18 without leave of the division of the court.

19 “(d) (1) If—

20 “(A) after the filing of a memorandum under  
21 subsection (b) of this section, the Attorney General  
22 receives additional specific information about the matter  
23 to which such memorandum related; and

24 “(B) the Attorney General determines, after such

1 additional investigation as the Attorney General deems  
2 appropriate, that such information warrants further in-  
3 vestigation or prosecution;

4 then the Attorney General shall, not later than ninety days  
5 after receiving such additional information, apply to the divi-  
6 sion of the court for the appointment of a special prosecutor.

7 “(2) Each application for the appointment of a special  
8 prosecutor shall contain sufficient information to enable the  
9 division of the court to select a special prosecutor and to  
10 define that special prosecutor’s prosecutorial jurisdiction.

11 “(3) Such application shall not be revealed to any  
12 individual outside the court or the Department of Justice  
13 without leave of the division of the court.

14 “(e) (1) For the purpose of this section, a conflict  
15 of interest or the appearance thereof is deemed to exist when-  
16 ever the continuation of an investigation or the outcome  
17 thereof may directly and substantially affect the partisan  
18 political or personal interests of the President, the Attorney  
19 General, or the interests of the President’s political party.

20 “(2) Whenever it reasonably appears that a conflict of  
21 interest, as defined in paragraph (1), exists, with respect to  
22 an investigation of specific information that an individual  
23 may have violated any Federal criminal law other than a  
24 violation constituting a petty offense, the Attorney General

1 shall conduct a preliminary investigation as required by  
2 subsection (a).

3 “(3) (A) If the Attorney General, upon completion of  
4 the preliminary investigation, finds that the matter is so  
5 unsubstantiated that no further investigation or prosecution  
6 is warranted, the Attorney General shall so notify the division  
7 of the court pursuant to subsection (b).

8 “(B) If the Attorney General, upon completion of the  
9 preliminary investigation, finds that the matter warrants fur-  
10 ther investigation or prosecution or if ninety days (one  
11 hundred and twenty days in the case of an extension) has  
12 elapsed from the time of the Attorney General's finding in  
13 paragraph (2) without a determination by the Attorney  
14 General that the matter is so unsubstantiated as not to war-  
15 rant further investigation or prosecution, then the Attorney  
16 General shall—

17 “(i) apply to the division of the court for the ap-  
18 pointment of a special prosecutor pursuant to subsection  
19 (c) ; or

20 “(ii) submit a memorandum to the division of the  
21 court setting forth the reasons why a special prosecutor  
22 is not required under the standard set forth in paragraph  
23 (1) of this subsection.

24 “(C) If the Attorney General concludes that appoint-

1 ment of a special prosecutor is not required under the stand-  
2 ard set forth in paragraph (1) of this subsection, the division  
3 of the court shall review the information provided by the  
4 Attorney General with respect to whether a conflict, as  
5 described in paragraph (1), exists. Upon request of the divi-  
6 sion of the court, the Attorney General shall make available  
7 to the division all documents, materials, and memorandums  
8 as the division finds necessary to carry out its duties under  
9 this subsection. If the division finds that continuing the investi-  
10 gation by the Department of Justice would create a conflict  
11 of interest, or the appearance thereof, as defined in para-  
12 graph (1), the division shall appoint a special prosecutor.

13 “(f) Any determinations or applications required to be  
14 made under this section by the Attorney General shall be  
15 made by the Director of the Office of Government Crimes if  
16 the information or allegations involve the Attorney General.

17 “(g) The Attorney General’s determination under sub-  
18 section (c), (d), or (e) to apply to the division of the  
19 court for the appointment of a special prosecutor shall not  
20 be reviewable in any court.

21 “(h) Documents, materials, and memorandums supplied  
22 to the court by the Department of Justice under this sub-  
23 section shall not be revealed to any individual outside the  
24 court or the Department of Justice without leave of the divi-  
25 sion of the court.

26 “(i) (1) Notwithstanding any other provision of this

1 title, the Attorney General shall, upon enactment of this  
2 title, conduct for a period not to exceed ninety days, a pre-  
3 liminary investigation into whether there has been since  
4 1970 improper or illegal conduct on the part of any Repre-  
5 sentative or Senator in the Congress of the United States  
6 with respect to the receipt or acceptance of any valuable  
7 consideration from representatives of any foreign government  
8 in order to influence legislation or other Government action.

9 “(2) (A) If the Attorney General, upon completion of  
10 the preliminary investigation, finds that the matter is so un-  
11 substantiated that no further investigation or prosecution is  
12 warranted, the Attorney General shall so notify the division  
13 of the court pursuant to subsection (b).

14 “(B) If the Attorney General, upon completion of the  
15 preliminary investigation, finds that the matter warrants  
16 further investigation or prosecution or if ninety days has  
17 elapsed from the time of enactment of this title without a  
18 finding by the Attorney General that the matter is so  
19 unsubstantiated as not to warrant further investigation or  
20 prosecution, then the Attorney General shall apply to the  
21 division of the court for the appointment of a special prose-  
22 cutor pursuant to subsection (c).

23 **“§ 593. Duties of the division of the court**

24 “(a) The division of the court which is referred to in  
25 this chapter, and to which functions are given by this chap-  
26 ter, is the division established under section 49 of this title.

1       “(b) Upon receipt of an application under subsection  
2       (c), (d), (e), or (f) of section 592, the division of the  
3       court shall appoint an appropriate special prosecutor and  
4       shall define the jurisdiction of that special prosecutor. The  
5       court may define such jurisdiction to extend to related  
6       matters. A special prosecutor’s identity and prosecutorial  
7       jurisdiction shall be made public upon request of the Attorney  
8       General or upon the determination of the division of the court  
9       that disclosure of the identity and prosecutorial jurisdiction  
10      of such special prosecutor would be in the best interest of  
11      justice. In any event the identity and prosecutorial jurisdic-  
12      tion of such prosecutor shall be made public when any indict-  
13      ment is returned.

14      “(c) The division of the court, upon request of the  
15      Attorney General, may assign new matters to an existing  
16      special prosecutor or may expand the prosecutorial jurisdic-  
17      tion of an existing special prosecutor to include related mat-  
18      ters. Such request may be incorporated in an application for  
19      the appointment of a special prosecutor under this chapter.

20      “(d) The division of the court may not appoint as a  
21      special prosecutor any person who holds or recently held  
22      any office of profit or trust under the United States.

23      **“§ 594. Authority and duties of a special prosecutor**

24      “(a) Notwithstanding any other provision of law, a  
25      special prosecutor appointed under this chapter shall have,

1 with respect to all matters in such special prosecutor's prose-  
2 cutorial jurisdiction established under this chapter, full power,  
3 and independent authority—

4 “(1) to conduct proceedings before grand juries and  
5 other investigations;

6 “(2) to participate in court proceedings and engage  
7 in any litigation, including civil and criminal matters,  
8 as he deems necessary;

9 “(3) to appeal any decision of a court in any case  
10 or proceeding in which such special prosecutor par-  
11 ticipates in an official capacity;

12 “(4) to review all documentary evidence available  
13 from any source;

14 “(5) to determine whether to contest the assertion  
15 of any testimonial privilege;

16 “(6) to receive appropriate national security clear-  
17 ances and, if necessary, contest in court, including, where  
18 appropriate, participation in in camera proceedings, any  
19 claim of privilege or attempt to withhold evidence on  
20 grounds of national security;

21 “(7) to make applications to any Federal court for  
22 a grant of immunity to any witness, consistent with ap-  
23 plicable statutory requirements, or for warrants, sub-  
24 penas, or other court orders, and for purposes of sections  
25 6003, 6004, and 6005, of title 18, a special prosecutor

1       may exercise the authority vested in a United States At-  
2       torney or the Attorney General;

3       “(8) to inspect, obtain, or use the original or a copy  
4       of any tax return, in accordance with the applicable  
5       statutes and regulations, and for purposes of section 6103  
6       of title 26, and the regulations issued thereunder, a spe-  
7       cial prosecutor may exercise the powers vested in a  
8       United States Attorney or the Attorney General;

9       “(9) to initiate and conduct prosecutions in any  
10      court of competent jurisdiction, frame and sign indict-  
11      ments, file informations, and handle all aspects of any  
12      case in the name of the United States; and

13      “(10) to exercise all other investigative and pros-  
14      ecutorial functions and powers of the Department of  
15      Justice, the Attorney General, and any other officer or  
16      employee of the Department of Justice, except that the  
17      Attorney General shall exercise direction or control as to  
18      those matters that specifically require the Attorney Gen-  
19      eral's personal action under section 2516 of title 18.

20      “(b) A special prosecutor appointed under this chapter  
21      shall receive compensation at a per diem rate equal to the  
22      rate of basic pay for level IV of the Executive Schedule  
23      under section 5315 of title 5.

24      “(c) For the purposes of carrying out the duties of  
25      the office of special prosecutor, a special prosecutor shall

1 have power to appoint, fix the compensation, and assign the  
2 duties of such employees as such special prosecutor deems  
3 necessary (including investigators, attorneys, and part-time  
4 consultants). The positions of all such employees are ex-  
5 empted from the competitive service. No such employee may  
6 be compensated at a rate exceeding the maximum rate pro-  
7 vided for GS-18 of the General Schedule under section 5332  
8 of title 5.

9 “(d) If requested by a special prosecutor, the Depart-  
10 ment of Justice shall provide to such special prosecutor assist-  
11 ance which shall include full access to any records, files, or  
12 other materials relevant to matters within his prosecutorial  
13 jurisdiction, and providing to such special prosecutor the re-  
14 sources and personnel required to perform such special pros-  
15 ecutor’s duties.

16 “(e) A special prosecutor may ask the Attorney General  
17 or the division of the court to refer matters related to the  
18 special prosecutor’s prosecutorial jurisdiction. A special pros-  
19 ecutor may accept referral of a matter by the Attorney Gen-  
20 eral, if the matter relates to a matter within such special  
21 prosecutor’s prosecutorial jurisdiction as established by the  
22 division of the court. If such a referral is accepted, the special  
23 prosecutor shall notify the division of the court.

24 “(f) To the maximum extent practicable, a special prose-  
25 cutor shall comply with the written policies of the Depart-

1 ment of Justice respecting enforcement of the criminal laws  
2 which have been promulgated prior to the special prosecutor's  
3 appointment.

4 **"§ 595. Reporting and congressional oversight**

5       “(a) A special prosecutor appointed under this chapter  
6 may from time to time make public, or send to the Congress,  
7 statements or reports on the activities of such special prosecu-  
8 tor. These statements and reports shall contain such informa-  
9 tion as that special prosecutor deems appropriate.

10       “(b) (1) In addition to any reports made under sub-  
11 section (a) of this section, a special prosecutor appointed  
12 under this chapter shall, at the conclusion of such special  
13 prosecutor's duties, submit to the division of the court a  
14 report under this subsection.

15       “(2) Such report shall set forth fully and completely  
16 a description of the work of the special prosecutor, including  
17 the disposition of all cases brought, and the reasons for not  
18 prosecuting any matter within the prosecutorial jurisdiction  
19 of such special prosecutor which was not prosecuted. The  
20 report shall be in sufficient detail to allow determination of  
21 whether the special prosecutor's investigation was thoroughly  
22 and fairly completed.

23       “(3) The division of the court may release to the Con-  
24 gress, the public, or to any appropriate person, without  
25 comment on the contents of the report, such portions of a

1 court to challenge the action of the Attorney General under  
2 this subsection by seeking reinstatement or other appropriate  
3 relief. The division of the court shall cause such an action in  
4 every way to be expedited. If a special prosecutor is removed  
5 from office, the Attorney General shall promptly submit to the  
6 judiciary committees of the Senate and the House of Repre-  
7 sentatives a report describing with particularity the grounds  
8 for such action. The committees shall make available to the  
9 public such report, except that each committee may, if neces-  
10 sary to avoid prejudicing the legal rights of any individual,  
11 delete or postpone publishing such portions of the report, or  
12 the whole report, or any name or other identifying details.

13 “(b) (1) An office of special prosecutor shall terminate  
14 upon the submission by the special prosecutor of written  
15 notification to the Attorney General that the investigation of  
16 all matters within the prosecutorial jurisdiction of such special  
17 prosecutor, or accepted by such special prosecutor under sec-  
18 tion 594(e), and any resulting prosecutions, have been  
19 completed or so substantially completed that it would be  
20 appropriate for the Department of Justice to complete such  
21 investigations and prosecutions. No such submission shall be  
22 effective to terminate such office until after the completion  
23 and filing of the report required under section 595(b) of  
24 this title.

25 “(2) The division of the court, either on its own motion

1 or upon the personal recommendation of the Attorney Gen-  
 2 eral, may terminate an office of special prosecutor at any time  
 3 on the ground that the investigation of all matters within the  
 4 prosecutorial jurisdiction of the special prosecutor, or accepted  
 5 by such special prosecutor under section 594 (e) , and any re-  
 6 sulting prosecutions, have been completed or so substantially  
 7 completed that it would be appropriate for the Department of  
 8 Justice to complete such investigations and prosecutions. At  
 9 the time of termination, the special prosecutor shall file the  
 10 report required by section 595 (b) of this title.

11 **"§ 597. Relationship with Department of Justice**

12 " (a) Whenever a matter is in the prosecutorial juris-  
 13 diction of a special prosecutor or has been accepted by a  
 14 special prosecutor under section 594 (e) , the Department  
 15 of Justice, the Attorney General, and all other officers and  
 16 employecs of the Department of Justice shall suspend all in-  
 17 vestigations and proceedings regarding such matter, except  
 18 as otherwise required by section 594 (d) of this title, and  
 19 except insofar as the special prosecutor agrees in writing  
 20 that such investigations or proceedings may be continued by  
 21 the Department of Justice.

22 " (b) The Attorney General or the Solicitor General  
 23 may, to the extent provided under existing law, make a  
 24 presentation to any court as to issues of law raised by any

1 case or proceeding in which a special prosecutor participates  
 2 in an official capacity, or any appeal of such a case or  
 3 proceeding.

4 **"§ 598. Termination of effect of chapter**

5        "This chapter shall cease to have effect five years after  
 6 the date on which it takes effect, except as to the completion  
 7 of then-pending matters, which in the judgment of the divi-  
 8 sion of the court require this chapter's continuance in effect,  
 9 with respect to which matters this chapter shall continue in  
 10 effect until such division determines that such matters have  
 11 been completed."

12        (b) The tables of chapters for title 28 of the United  
 13 States Code and for part II of such title 28 are each amended  
 14 by inserting immediately after the item relating to chapter  
 15 37 the following new item:

"39. Special prosecutor."

16        (c) There are authorized to be appropriated for each  
 17 fiscal year such sums as may be necessary, to be held by  
 18 the Department of Justice as a contingent fund for the use  
 19 of any special prosecutors appointed under chapter 39  
 20 (relating to special prosecutor) of title 28 of the United  
 21 States Code in the carrying out of functions under such  
 22 chapter.

1 ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT SPECIAL  
2 PROSECUTORS

3 SEC. 102. (a) Chapter 3 of title 28 of the United States  
4 Code is amended by adding at the end the following new  
5 section:

6 "§ 49. Assignment of judges to division to appoint special  
7 prosecutors

8       “(a) Beginning with the two-year period commencing  
9   on the date chapter 39 of this title takes effect, five judges or  
10 justices shall be assigned for each successive two-year period  
11 to a division of the United States Court of Appeals for the  
12 District of Columbia to be the special panel of the court for  
13 the purposes of chapter 39 of this title.

14       “(b) Except as provided in subsection (f) of this sec-  
15       tion, assignment to the division established in subsection (a)  
16       of this section shall not be a bar to other judicial assignments  
17       during the term of such division.

18       “(c) In assigning judges or justices to sit on the division  
19 established in subsection (a) of this section, priority shall be  
20 given to senior retired circuit judges and senior retired  
21 justices.

22       “(d) The chief judge of the United States Court of  
23 Appeals for the District of Columbia shall make a request to  
24 the Chief Justice of the United States, without presenting a  
25 certificate of necessity, to designate and assign, in accordance

1 with section 294 of this title, five circuit court judges or  
2 justices, one of which shall be a judge of the United States  
3 Court of Appeals for the District of Columbia, to the division  
4 established under subsection (a) of this section. Not more  
5 than one judge or justice or retired judge or justice may be  
6 named to the panel from a particular court.

7 “(e) Any vacancy in the division established under sub-  
8 section (a) of this section shall be filled only for the remainder  
9 of the two-year period in which such vacancy occurs and in  
10 the same manner as initial assignments to the division were  
11 made.

12 “(f) No judge or justice who, as a member of the division  
13 established in subsection (a) of this section, participated in a  
14 function conferred on the division under chapter 39 of this  
15 title involving a special prosecutor shall be eligible to partici-  
16 pate in any judicial proceeding concerning a matter which  
17 involves such special prosecutor while such special prosecutor  
18 is serving in that office or which involves the exercise of such  
19 special prosecutor's official duties, regardless of whether such  
20 special prosecutor is still serving in that office.”

21 (b) The table of sections for chapter 3 of title 28 of the  
22 United States Code is amended by adding at the end the  
23 following item:

“49. Assignment of judges to division to appoint special prosecutors.”

1 DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE  
2 DEPARTMENT OF JUSTICE AND OFFICE OF GOVERN-  
3 MENT CRIMES

4 SEC. 103. Chapter 31 of title 28 of the United States  
5 Code is amended by adding at the end the following:

6 "§ 528. Disqualification of officers and employees of the  
7 Department of Justice

8 "The Attorney General shall promulgate rules and reg-  
9 ulations which require any officer or employee of the Depart-  
10 ment of Justice, including a United States Attorney or a  
11 member of his staff, to disqualify himself from participation  
12 in a particular investigation or prosecution if such partici-  
13 pation may result in a personal, financial, or political conflict  
14 of interest, or the appearance thereof. Such rules and regula-  
15 tions may provide that a willful violation of any provision  
16 thereof shall result in removal from office.

17 "§ 529. Office of Government Crimes

18 "(a) (1) There is established within the Department of  
19 Justice an Office of Government Crimes, which shall be  
20 headed by a director. The Director of the Office of Govern-  
21 ment Crimes shall be appointed by the President with the  
22 advice and consent of the Senate. The Attorney General  
23 shall determine the organizational placement of the office  
24 within the Department and shall be kept periodically in-  
25 formed of its activities.

1       “(2) A person shall not be appointed director of the  
2 Office of Government Crimes if he has at any time during  
3 the five years preceding such appointment held a high-level  
4 position of trust and responsibility on the personal campaign  
5 staff of, or in an organization or political party working  
6 on behalf of, a candidate for any elective Federal office.

7       “(b) (1) The Attorney General shall, except as pro-  
8 vided in paragraph (2) and except as to matters referred  
9 to a special prosecutor pursuant to chapter 39 of this title,  
10 delegate to the Office of Government Crimes jurisdiction of  
11 (1) criminal violations of Federal law by any individual who  
12 holds or who at the time of such possible violation held a  
13 position, whether or not elective, as a Federal Government  
14 officer, employee, or special employee, which alleged vio-  
15 lation related directly or indirectly to such individual's  
16 Government position, employment, or compensation; (2)  
17 criminal violations of Federal laws relating to lobbying,  
18 conflicts of interest, campaigns, and election to public office  
19 committed by any person except insofar as such violations  
20 relate to matters involving discrimination or intimidation  
21 on the grounds of race, color, religion or national origin;  
22 (3) the supervision of investigations and prosecutions of  
23 criminal violations of Federal law by any individual who  
24 holds or who at the time of such possible violation held a  
25 position, whether or not elective, as a State or local gov-

1 ernment officer or employee, which alleged violation re-  
2 lated directly or indirectly to his government position, em-  
3 ployment or compensation; and (4) such other matters as  
4 the Attorney General may deem appropriate.

5       “(2) A matter described in paragraph (1) of this sub-  
6 section may be delegated by the Attorney General exclusively  
7 or concurrently to the United States Attorneys or other  
8 units of the Department of Justice. The Director shall be  
9 kept apprised of the progress of any investigation or prosecu-  
10 tion so delegated. This section shall not limit any authority  
11 conferred upon the Attorney General, the Federal Bureau  
12 of Investigation, or any other department or agency of gov-  
13 ernment to investigate any matter.

14       “(c) (1) At the beginning of each regular session of  
15 the Congress, the Attorney General shall report to the Con-  
16 gress on the activities and operation of the Office of Govern-  
17 ment Crimes for the preceding fiscal year.

18       “(2) such report shall specify the number and type of  
19 investigations and prosecutions subject to the jurisdiction of  
20 such unit and the disposition thereof, but shall not include  
21 any information which would impair an ongoing investiga-  
22 tion, prosecution, or proceeding, or which the Attorney Gen-  
23 eral determines would constitute an improper invasion of  
24 personal privacy.”.

25       (b) The table of sections for chapter 31 of title 28 of the

1 United States Code is amended by adding at the end the  
2 following:

"528. Disqualification of officers and employees of the Department of Justice.

"529. Office of Government Crimes."

3 (e) Section 5315 of title 5, United States Code, is  
4 amended by adding at the end thereof the following new  
5 paragraph:

6 "(114) Director, Office of Government Crimes, De-  
7 partment of Justice."

#### 8 SEPARABILITY

9 SEC. 104. If any part of this title is held invalid, the  
10 remainder of the title shall not be affected thereby. If any  
11 provision of any part of this title, or the application thereof  
12 to any person or circumstance, is held invalid, the provisions  
13 of other parts and their application to other persons or cir-  
14 cumstances shall not be affected thereby.

#### 15 LEADING PARTISAN ROLE IN THE ELECTION OF A

#### 16 PRESIDENT

17 SEC. 105. An individual who has played a leading par-  
18 tisan role in the election of a President shall not be appointed  
19 Attorney General or Deputy Attorney General. Individuals  
20 holding the position of national campaign manager, national  
21 chairman of the finance committee, chairman of the national  
22 political party, or other comparable high level campaign role

- 1 involved in electing the President should be those considered
- 2 to have played a leading partisan role.

• • • • •

Passed the Senate June 27 (legislative day, May 18),  
1977.

Attest:

J. S. KIMMITT,  
*Secretary.*

## APPENDIX 6

The House of Representatives did not separately consider H.R. 9705. However, during the conference on S. 555, which the House passed on September 27, 1978, the conferees agreed to include special prosecutor provisions as a part of the Conference Report. The Senate agreed to the Conference Report on October 7, 1978, and the House did so on October 12, 1978.

|                             |   |                          |   |                       |
|-----------------------------|---|--------------------------|---|-----------------------|
| 95TH CONGRESS<br>2d Session | } | HOUSE OF REPRESENTATIVES | { | REPORT<br>No. 95-1756 |
|-----------------------------|---|--------------------------|---|-----------------------|

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## ETHICS IN GOVERNMENT ACT OF 1978

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OCTOBER 11, 1978.—Ordered to be printed

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Mr. DANIELSON, from the committee of conference,  
submitted the following

## CONFERENCE REPORT

[To accompany S. 555]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 555) to establish certain Federal agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment to the text of the bill insert the following:

*That this Act may be cited as the "Ethics in Government Act of 1978".*

# **TITLE VI—AMENDMENTS TO TITLE 28, UNITED STATES CODE**

## **SPECIAL PROSECUTOR**

*Sec. 601. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 37 the following new chapter:*

### **"Chapter 39.—SPECIAL PROSECUTOR**

*"Sec.*

*"591. Applicability of provisions of this chapter.*

*"592. Application for appointment of a special prosecutor.*

*"593. Duties of the division of the court.*

*"594. Authority and duties of a special prosecutor.*

*"595. Reporting and congressional oversight.*

*"596. Removal of a special prosecutor; termination of office.*

*"597. Relationship with Department of Justice.*

*"598. Termination of effect of chapter.*

### **"§ 591. Applicability of provisions of this chapter**

*"(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.*

*"(b) The persons referred to in subsection (a) of this section are—*

*"(1) The President and Vice President;*

*"(2) any individual serving in a position listed in section 5312 of title 5;*

*"(3) any individual working in the Executive Office of the President and compensated at a rate not less than the rate provided for level IV of the Executive Schedule under section 5315 of title 5;*

*"(4) any individual working in the Department of Justice and compensated at a rate not less than the rate provided for level III*

of the Executive Schedule under section 5314 of title 5; any Assistant Attorney General; the Director of Central Intelligence; the Deputy Director of Central Intelligence; and the Commissioner of Internal Revenue;

"(5) any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and

"(6) any officer of the principal national campaign committee seeking the election or reelection of the President.

#### **"§ 592. Application for appointment of a special prosecutor**

"(a) The Attorney General, upon receiving specific information that any of the persons described in section 591 (b) of this title has engaged in conduct described in section 591 (a) of this title, shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate.

"(b) (1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593 (a) of this title, and the division of the court shall have no power to appoint a special prosecutor.

"(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

"(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

"(c) (1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that the matter is so unsubstantiated as not to warrant further investigation or prosecution, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor.

"(2) If—

"(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional specific information about the matter to which such memorandum related; and

"(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that such information warrants further investigation or prosecution, then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of a special prosecutor.

"(d) (1) Any application under this chapter shall contain sufficient information to assist the division of the court to select a special prosecutor and to define that special prosecutor's prosecutorial jurisdiction.

"(2) No application or any other documents, materials, or memo-

*randums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.*

*"(e) The Attorney General may ask a special prosecutor to accept referral of a matter that relates to a matter within that special prosecutor's prosecutorial jurisdiction.*

*"(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of a special prosecutor shall not be reviewable in any court.*

**"§ 593. Duties of the division of the court**

*"(a) The division of the court to which this chapter refers is the division established under section 49 of this title.*

*"(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate special prosecutor and shall define that special prosecutor's prosecutorial jurisdiction. A special prosecutor's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such special prosecutor would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such prosecutor shall be made public when any indictment is returned or any criminal information is filed.*

*"(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing special prosecutor, and such expansion may be in lieu of the appointment of an additional special prosecutor.*

*"(d) The division of the court may not appoint as a special prosecutor any person who holds or recently held any office of profit or trust under the United States.*

*"(e) If a vacancy in office arises by reason of the resignation or death of a special prosecutor, the division of the court may appoint a special prosecutor to complete the work of the special prosecutor whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of a special prosecutor, the division of the court may appoint an acting special prosecutor to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.*

**"§ 594. Authority and duties of a special prosecutor**

*"(a) Notwithstanding any other provision of law, a special prosecutor appointed under this chapter shall have, with respect to all matters in such special prosecutor's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—*

*"(1) conducting proceedings before grand juries and other investigations;*

"(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such special prosecutor deems necessary;

"(3) appealing any decision of a court in any case or proceeding in which such special prosecutor participates in an official capacity;

"(4) reviewing all documentary evidence available from any source;

"(5) determining whether to contest the assertion of any testimonial privilege;

"(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

"(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005, of title 18, exercising the authority vested in a United States attorney or the Attorney General;

"(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of title 26, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

"(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States.

"(b) A special prosecutor appointed under this chapter shall receive compensation at a per diem rate equal to the rate of pay for level IV of the Executive Schedule under section 5315 of title 5.

"(c) For the purposes of carrying out the duties of the office of special prosecutor, a special prosecutor shall have power to appoint, fix the compensation, and assign the duties of such employees as such special prosecutor deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

"(d) A special prosecutor may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such special prosecutor's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such special prosecutor's duties.

"(e) A special prosecutor may ask the Attorney General or the division of the court to refer matters related to the special prosecutor's prosecutorial jurisdiction. A special prosecutor may accept referral of a matter by the Attorney General, if the matter relates to a matter within such special prosecutor's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the special prosecutor shall notify the division of the court.

*"(f) A special prosecutor shall, to the extent that such special prosecutor deems appropriate, comply with the written policies of the Department of Justice respecting enforcement of the criminal laws.*

***"§ 595. Reporting and congressional oversight***

*"(a) A special prosecutor appointed under this chapter may make public from time to time, and shall send to the Congress, statements or reports on the activities of such special prosecutor. These statements and reports shall contain such information as that special prosecutor deems appropriate.*

*"(b) (1) In addition to any reports made under subsection (a) of this section, and before the termination of a special prosecutor's office under section 596(b) of this title, such special prosecutor shall submit to the division of the court a report under this subsection.*

*"(3) A report under the subsection shall set forth fully and completely a description of the work of the special prosecutor, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such special prosecutor which was not prosecuted.*

*"(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.*

*"(c) A special prosecutor shall advise the House of Representatives of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.*

*"(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any special prosecutor appointed under this chapter, and such special prosecutor shall have the duty to cooperate with the exercise of such oversight jurisdiction.*

*"(e) A majority of majority party members or a majority of all all nonmajority party members of a judiciary committee of either House of the Congress may request in writing that the Attorney General apply for the appointment of a special prosecutor. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the*

committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

**"§ 596. Removal of a special prosecutor; termination of office**

"(a) (1) A special prosecutor appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties.

"(2) If a special prosecutor is removed from office, the Attorney General shall promptly submit to the division of the court and the judiciary committees of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595 (b) (3) of this title and under the same limitations as apply to the release of a report under that section.

"(3) A special prosecutor so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.

"(b) (1) An office of special prosecutor shall terminate when (A) the special prosecutor notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such special prosecutor or accepted by such special prosecutor under section 594 (e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the special prosecutor files a report in full compliance with section 595 (b) of this title.

"(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of special prosecutor at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the special prosecutor or accepted by such special prosecutor under section 594 (e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the special prosecutor shall file the report required by section 595 (b) of this title.

**"§ 597. Relationship with Department of Justice**

"(a) Whenever a matter is in the prosecutorial jurisdiction of a special prosecutor or has been accepted by a special prosecutor under sec-

tion 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such special prosecutor agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

"(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity or any appeal of such a case or proceeding.

**"§ 598. Termination of effect of chapter**

"This chapter shall cease to have effect five years after the date of the enactment of this chapter, except that this chapter shall continue in effect with respect to then pending matters before a special prosecutor that in the judgment of such special prosecutor require such continuation until that special prosecutor determines such matters have been completed."

(b) The tables of chapters for title 28 of the United States Code and for part II of such title 28 are each amended by inserting immediately after the item relating to chapter 37 the following new item:

"39. Special prosecutor."

(c) There are authorized to be appropriated for each fiscal year such sums as may be necessary, to be held by the Department of Justice as a contingent fund for the use of any special prosecutors appointed under chapter 39 (relating to special prosecutor) of title 28 of the United States Code in the carrying out of functions under such chapter.

**ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT SPECIAL PROSECUTORS**

SEC. 602. (a) Chapter 3 of title 28 of the United States Code is amended by adding at the end the following:

**"§ 49. Assignment of judges to division to appoint special prosecutors**

"(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing special prosecutors.

"(b) Except as provided under subsection (f) of this section, assignment to such division of the court shall not be a bar to other judicial assignments during the term of such division.

"(c) In assigning judges or justices to sit on such division of the court, priority shall be given to senior circuit judges and retired justices.

"(d) The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Co-

*lumbia, to such division of the court. Not more than one judge or justice or senior or retired judge or justice may be named to such division from a particular court.*

*"(c) Any vacancy in such division of the court shall be filled only for the remainder of the two-year period in which such vacancy occurs and in the same manner as initial assignments to such division were made.*

*"(f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving a special prosecutor shall be eligible to participate in any judicial proceeding concerning a matter which involves such special prosecutor while such special prosecutor is serving in that office or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office."*

*(b) The table of sections for chapter 3 of title 28 of the United States Code is amended by adding at the end the following item:*

*"49. Assignment of judges to division to appoint special prosecutors."*

**DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF JUSTICE AND ANNUAL REPORT OF ATTORNEY GENERAL**

**SEC. 603.** *(a) Chapter 31 of title 28 of the United States Code is amended by adding at the end the following:*

**"§ 528. Disqualification of officers and employees of the Department of Justice**

*"The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.*

**"§ 529. Annual report of Attorney General**

*"Beginning on June 7, 1979, and at the beginning of each regular session of Congress thereafter, the Attorney General shall report to Congress on the activities and operations of the Public Integrity Section or any other unit of the Department of Justice designated to supervise the investigation and prosecution of—*

*"(1) any violation of Federal criminal law by any individual who holds or who at the time of such violation held a position, whether or not elective, as a Federal Government officer, employee, or special employee, if such violation relates directly or indirectly to such individual's Federal Government position, employment, or compensation;*

*"(2) any violation of any Federal criminal law relating to lobbying, conflict of interest, campaigns, and election to public office committed by any person, except insofar as such violation relates to a matter involving discrimination or intimidation on grounds of race, color, religion, or national origin;*

"(3) any violation of Federal criminal law by any individual who holds or who at the time of such violation held a position, whether or not elective, as a State or local government officer or employee, if such violation relates directly or indirectly to such individual's State or local government position, employment, or compensation; and

"(4) such other matters as the Attorney General may deem appropriate.

Such report shall include the number, type, and disposition of all investigations and prosecutions supervised by such Section or such unit, except that such report shall not disclose information which would interfere with any pending investigation or prosecution or which would improperly infringe upon the privacy rights of any individual."

(b) The table of sections for chapter 31 of title 28 of the United States Code is amended by adding at the end the following:

"528. Disqualification of officers and employees of the Department of Justice.  
"529. Annual report of Attorney General."

#### EFFECTIVE DATE

SEC. 604. Except as provided in this section, the amendments made by this title shall take effect on the date of the enactment of this Act. The provisions of chapter 39 of title 28 of the United States Code, as added by section 601 of this Act, shall not apply to specific information received by the Attorney General pursuant to section 591 of such title 28, if the Attorney General determines that—

(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

(2) such specific information is related to a matter which has been presented to a grand jury and is received by the Attorney General within one hundred and eighty days of the date of the enactment of this Act; or

(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within ninety days of the date of the enactment of this Act.

## TITLE VI—AMENDMENTS TO TITLE 28, UNITED STATES CODE

The Senate bill, in title I, provided a mechanism for the appointment of temporary special prosecutors on an *ad hoc* basis in appropriate, limited circumstances. While the House amendment contained no similar provisions, there is legislation pending before the House, H.R. 9705, which contains substantially the same provisions as title I of the Senate bill. H.R. 9705 was reported favorably by the House Committee on the Judiciary on June 19, 1978, by a vote of 24-6.<sup>1</sup>

The conferees have agreed to provide a mechanism for the appointment of temporary special prosecutors. Title VI of the Conference Report establishes a mechanism that is substantially the same as title I of the Senate bill and H.R. 9705. When the Attorney General receives specific information that a specified individual may have violated a Federal criminal law, the Attorney General conducts a pre-

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<sup>1</sup> See House Report No. 95-1307. The provisions of title I of the Senate bill are discussed in Senate Report No. 95-170.

liminary investigation of the matter, which may last for up to 90 days. If the Attorney General concludes at the end of the preliminary investigation that further investigation, or prosecution, is warranted, the Attorney General must apply to a special division of the Court of Appeals for the District of Columbia, which is established by this legislation, for the appointment of a special prosecutor. However, if the Attorney General concludes at the completion of the preliminary investigation that the matter is so unsubstantiated that it warrants no further investigation, the Attorney General need take no further action and no special prosecutor would be appointed.

The individuals covered by this legislation are (1) the President and Vice President; (2) Cabinet and Cabinet-level officials (someone serving in a position listed in section 5312 of title 5, United States Code); (3) high-ranking White House officials (someone working in the Executive Office of the President who is compensated at a rate not less than the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code); (4) high-ranking Justice Department officials, such as an assistant attorney general and the Director of the FBI, as well as the Director and Deputy Director of Central Intelligence and the Commissioner of Internal Revenue; (5) any individual who held any of the above-mentioned offices during the incumbency of the President or the previous President, if that President was of the same political party; and (6) any officer of the principal national campaign committee seeking the election or reelection of the President.

A special prosecutor, when appointed, serves only until completion of the investigation or prosecution he was appointed to handle. The special prosecutor is given full authority to investigate and prosecute the matter, thereby ensuring independence of judgment. At the same time, however, a special prosecutor is required to file periodic reports with Congress and cooperate with the oversight jurisdiction of the House and Senate Judiciary Committees, thereby insuring accountability. The special prosecutor can be removed from office by the personal action of the Attorney General, but only for extraordinary impropriety, physical disability, mental incapacity or another condition substantially impairing the performance of his duties. The Attorney General's removal power is not unchecked; a removed special prosecutor is entitled to contest his removal in a civil action heard by the appointing court.

The Senate bill had listed among the individuals covered by the legislation "a national campaign manager or chairman of any national campaign committee seeking the election or reelection of the President." The Justice Department expressed the concern that this provision could be construed to cover individuals chairing any one of the hundreds of campaign committees which spring up during a national campaign ("Youth for Carter," "Doctors for Ford," etc.). This result was unintended, and the conference amended this provision to cover only the officers of the principal national campaign committee seeking election or reelection of the President.

The Senate bill was written so as to take effect immediately upon enactment. The conferees recognized, however, that such a provision might, in some circumstances, lead to the appointment of a special prosecutor where it would be unduly disruptive to the orderly and efficient handling of an ongoing case. The conferees believe that the

provisions should take effect upon enactment of the legislation, but they decided to provide limited exceptions in a narrow range of circumstances. Since these exceptions are designed to accommodate a rather brief transitional period, and since the provision uses the term "directly related" and "related" the conferees intend and expect that the exceptions will be narrowly construed to accommodate the transitional period.

The first situation is where the Attorney General determines that the specific information he receives is directly related to a prosecution already pending.<sup>2</sup> In this context, the use of the term "directly related" to a pending prosecution requires that the information furnished to the Attorney General concerning an individual covered by the legislation would relate to a prosecution then pending against that individual.

The second situation is where the Attorney General determines that the specific information is related to a matter which has been presented to a grand jury, if the information is received by the Attorney General within one hundred and eighty days of the date of enactment. The third situation is where the Attorney General determines that the specific information is related to a pending investigation, if the information is received within ninety days of the date of enactment. In the context of exceptions (2) and (3), the conferees intend that the term "related" be given a more liberal construction. In those cases, information concerning a covered individual could be "related" to a matter before the grand jury or to a matter under investigation if it pertained to the same incidents or transactions or course of conduct being investigated.

The Senate bill included a provision to establish an Office of Government Crimes within the Department of Justice. The House amendment contained no comparable provision. The conferees agreed to delete this provision and to add instead a provision requiring that the Attorney General report annually to the Congress about the activities of the Public Integrity Section of the Justice Department's Criminal Division.

The investigation and prosecution of violations of Federal criminal law involving the integrity of public officials and government officers and employees is a matter of great importance. The Attorney General has charged the Public Integrity Section of the Justice Department's Criminal Division with the responsibility for supervising such investigations and prosecutions. The conferees support the Attorney General in the priority and emphasis that the Justice Department is giving to law enforcement activities with respect to corruption and misconduct by public officials and government officers and employees. The conferees urge the Attorney General to maintain the Public Integrity Section and to continue such law enforcement activities in a vigorous manner.

Because of the importance of such law enforcement activities, the conferees believe that it would assist the Congress in its oversight function to require the Attorney General to report annually on the efforts of the Department of Justice to investigate and prosecute Federal offenses involving the integrity of public officials and government officers and employees. While this provision does not require that the

<sup>2</sup> A "prosecution" cannot be "pending" until an indictment is returned or an information is filed.

Attorney General centralize in one section or unit all of the Justice Department's law enforcement activities in this area, the conferees expect the Attorney General to consult with the Judiciary Committees of both Houses of Congress before substantially altering the scope of authority or mandate of the Public Integrity Section of the Criminal Division.

GEORGE DANIELSON,  
 RICHARDSON PREYER,  
 PAT SCHROEDER,  
 SAMUEL STRATTON,  
 DAVID R. OBEY,  
 (Except for title VI)

HERBERT E. HARRIS,  
 JAMES R. MANN,  
 R. L. MAZZOLI,  
 BOB ECKHARDT,  
 BENJAMIN A. GILMAN,  
 CARLOS J. MOORHEAD,  
 BILL FRENZEL,  
 ROBERT W. KASTENMEIER,

*Managers on the Part of the House.*

ABE RIBICOFF,  
 HENRY M. JACKSON,  
 EDMUND S. MUSKIE,  
 CHARLES H. PERCY,  
 J. K. JAVITS,

*Managers on the Part of the Senate.*

**APPENDIX 7**

The President signed S. 555 into law on October 26, 1978 (Public Law 95-521).

**PUBLIC LAW 95-521—OCT. 26, 1978**

**ETHICS IN GOVERNMENT ACT OF 1978**

92 STAT. 1824

PUBLIC LAW 95-521—OCT. 26, 1978

Public Law 95-521  
95th Congress

An Act

Oct. 26, 1978

[S. 555]

To establish certain Federal agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions, and for other purposes.

Ethics in  
Government Act  
of 1978.  
2 USC 701.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Ethics in Government Act of 1978".*

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**TITLE VI—AMENDMENTS TO TITLE 28,  
UNITED STATES CODE**

**SPECIAL PROSECUTOR**

**Sec. 601.** (a) Title 28 of the United States Code is amended by inserting immediately after chapter 37 the following new chapter: 28 USC 581.

**“Chapter 39.—SPECIAL PROSECUTOR**

**“Sec.**

- “591.** Applicability of provisions of this chapter.
- “592.** Application for appointment of a special prosecutor.
- “593.** Duties of the division of the court.
- “594.** Authority and duties of a special prosecutor.
- “595.** Reporting and congressional oversight.
- “596.** Removal of a special prosecutor; termination of office.
- “597.** Relationship with Department of Justice.
- “598.** Termination of effect of chapter.

**“§ 591. Applicability of provisions of this chapter** 28 USC 591.

**“(a)** The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense. Investigation.

"(b) The persons referred to in subsection (a) of this section are—

"(1) the President and Vice President;

"(2) any individual serving in a position listed in section 5312 of title 5;

"(3) any individual working in the Executive Office of the President and compensated at a rate not less than the annual rate of basic pay provided for level IV of the Executive Schedule under section 5315 of title 5;

"(4) any individual working in the Department of Justice and compensated at a rate not less than the annual rate of basic pay provided for level III of the Executive Schedule under section 5314 of title 5, any Assistant Attorney General, the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

"(5) any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and

"(6) any officer of the principal national campaign committee seeking the election or reelection of the President.

28 USC 592.  
Preliminary  
investigation.

"§ 592. Application for appointment of a special prosecutor

"(a) The Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title has engaged in conduct described in section 591(a) of this title, shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate.

Notification.

"(b) (1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a special prosecutor.

"(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

"(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

"(c) (1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that the matter is so unsubstantiated as to warrant further investigation or prosecution, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor.

"(2) If—

"(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional specific information about the matter to which such memorandum related, and

"(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that such information warrants further investigation or prosecution, then the Attorney General shall, not later than ninety days after

receiving such additional information, apply to the division of the court for the appointment of a special prosecutor.

"(d) (1) Any application under this chapter shall contain sufficient information to assist the division of the court to select a special prosecutor and to define that special prosecutor's prosecutorial jurisdiction.

"(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

"(e) The Attorney General may ask a special prosecutor to accept referral of a matter that relates to a matter within that special prosecutor's prosecutorial jurisdiction.

"(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of a special prosecutor shall not be reviewable in any court.

**"§ 593. Duties of the division of the court**

28 USC 593.

"(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

"(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate special prosecutor and shall define that special prosecutor's prosecutorial jurisdiction. A special prosecutor's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such special prosecutor would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such prosecutor shall be made public when any indictment is returned or any criminal information is filed.

Appointment.

"(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing special prosecutor, and such expansion may be in lieu of the appointment of an additional special prosecutor.

"(d) The division of the court may not appoint as a special prosecutor any person who holds or recently held any office of profit or trust under the United States.

"(e) If a vacancy in office arises by reason of the resignation or death of a special prosecutor, the division of the court may appoint a special prosecutor to complete the work of the special prosecutor whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of a special prosecutor, the division of the court may appoint an acting special prosecutor to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

Vacancy.

**"§ 594. Authority and duties of a special prosecutor**

28 USC 594.

"(a) Notwithstanding any other provision of law, a special prosecutor appointed under this chapter shall have, with respect to all matters in such special prosecutor's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that

specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

"(1) conducting proceedings before grand juries and other investigations;

"(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such special prosecutor deems necessary;

"(3) appealing any decision of a court in any case or proceeding in which such special prosecutor participates in an official capacity;

"(4) reviewing all documentary evidence available from any source;

"(5) determining whether to contest the assertion of any testimonial privilege;

"(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

"(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

"(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

"(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States.

**Compensation.**

"(b) A special prosecutor appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

**Employees,  
appointment.**

"(c) For the purposes of carrying out the duties of the office of special prosecutor, a special prosecutor shall have power to appoint, fix the compensation, and assign the duties, of such employees as such special prosecutor deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

**Compensation.**

**Assistance.**

"(d) A special prosecutor may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such special prosecutor's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such special prosecutor's duties.

"(e) A special prosecutor may ask the Attorney General or the division of the court to refer matters related to the special prosecutor's prosecutorial jurisdiction. A special prosecutor may accept referral

of a matter by the Attorney General, if the matter relates to a matter within such special prosecutor's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the special prosecutor shall notify the division of the court.

**Notification.**

"(f) A special prosecutor shall, to the extent that such special prosecutor deems appropriate, comply with the written policies of the Department of Justice respecting enforcement of the criminal laws.

**"§ 595. Reporting and congressional oversight**

**28 USC 595.**

"(a) A special prosecutor appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such special prosecutor. These statements and reports shall contain such information as such special prosecutor deems appropriate.

"(b) (1) In addition to any reports made under subsection (a) of this section, and before the termination of a special prosecutor's office under section 596(b) of this title, such special prosecutor shall submit to the division of the court a report under this subsection.

**Report contents.**

"(2) A report under this subsection shall set forth fully and completely a description of the work of the special prosecutor, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such special prosecutor which was not prosecuted.

"(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

"(c) A special prosecutor shall advise the House of Representatives of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

**Oversight jurisdiction.**

"(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any special prosecutor appointed under this chapter, and such special prosecutor shall have the duty to cooperate with the exercise of such oversight jurisdiction.

"(e) A majority of majority party members or a majority of all non-majority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a special prosecutor. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application

**Written notification.**

has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

28 USC 596.

**“§ 596. Removal of a special prosecutor; termination of office**

“(a) (1) A special prosecutor appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties.

Report, submitted  
to congressional  
committees.

“(2) If a special prosecutor is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

Judicial review.

“(3) A special prosecutor so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.

Notification.

“(b) (1) An office of special prosecutor shall terminate when (A) the special prosecutor notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such special prosecutor or accepted by such special prosecutor under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the special prosecutor files a report in full compliance with section 595(b) of this title.

“(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of special prosecutor at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the special prosecutor or accepted by such special prosecutor under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the special prosecutor shall file the report required by section 595(b) of this title.

28 USC 597.

**“§ 597. Relationship with Department of Justice**

“(a) Whenever a matter is in the prosecutorial jurisdiction of a special prosecutor or has been accepted by a special prosecutor under section 594(e) of this title, the Department of Justice, the Attorney

General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such special prosecutor agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

“(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity or any appeal of such a case or proceeding.

“§ 598. Termination of effect of chapter

28 USC 598.

“This chapter shall cease to have effect five years after the date of the enactment of this chapter, except that this chapter shall continue in effect with respect to then pending matters before a special prosecutor that in the judgment of such special prosecutor require such continuation until that special prosecutor determines such matters have been completed.”

(b) The tables of chapters for title 28 of the United States Code and for part II of such title 28 are each amended by inserting immediately after the item relating to chapter 37 the following new item:

“39. Special prosecutor.”.

(c) There are authorized to be appropriated for each fiscal year such sums as may be necessary, to be held by the Department of Justice as a contingent fund for the use of any special prosecutors appointed under chapter 39 (relating to special prosecutor) of title 28 of the United States Code in the carrying out of functions under such chapter.

Appropriation  
authorization.  
28 USC 591 note.

ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT SPECIAL PROSECUTORS

SEC. 602. (a) Chapter 3 of title 28 of the United States Code is amended by adding at the end the following:

“§ 49. Assignment of judges to division to appoint special prosecutors

28 USC 49.

“(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing special prosecutors.

“(b) Except as provided under subsection (f) of this section, assignment to such division of the court shall not be a bar to other judicial assignments during the term of such division.

“(c) In assigning judges or justices to sit on such division of the court, priority shall be given to senior circuit judges and retired justices.

Priority.

“(d) The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia, to such division of the court. Not more than one judge or justice or senior or retired judge or justice may be named to such division from a particular court.

“(e) Any vacancy in such division of the court shall be filled only for the remainder of the two-year period in which such vacancy

Vacancy.

occurs and in the same manner as initial assignments to such division were made.

"(f) Except as otherwise provided in chapter 39 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39 of this title involving a special prosecutor shall be eligible to participate in any judicial proceeding concerning a matter which involves such special prosecutor while such special prosecutor is serving in that office or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office."

(b) The table of sections for chapter 3 of title 28 of the United States Code is amended by adding at the end the following item:

"49. Assignment of judges to division to appoint special prosecutors."

**DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF JUSTICE AND ANNUAL REPORT OF ATTORNEY GENERAL**

SEC. 603. (a) Chapter 31 of title 28 of the United States Code is amended by adding at the end the following:

28 USC 528.

**"§ 528. Disqualification of officers and employees of the Department of Justice**

Rules and regulations.

"The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.

28 USC 529.

**"§ 529. Annual report of Attorney General**

Report to Congress.

"Beginning on June 1, 1979, and at the beginning of each regular session of Congress thereafter, the Attorney General shall report to Congress on the activities and operations of the Public Integrity Section or any other unit of the Department of Justice designated to supervise the investigation and prosecution of—

"(1) any violation of Federal criminal law by any individual who holds or who at the time of such violation held a position, whether or not elective, as a Federal Government officer, employee, or special employee, if such violation relates directly or indirectly to such individual's Federal Government position, employment, or compensation;

"(2) any violation of any Federal criminal law relating to lobbying, conflict of interest, campaigns, and election to public office committed by any person, except insofar as such violation relates to a matter involving discrimination or intimidation on grounds of race, color, religion, or national origin;

"(3) any violation of Federal criminal law by any individual who holds or who at the time of such violation held a position, whether or not elective, as a State or local government officer or employee, if such violation relates directly or indirectly to such individual's State or local government position, employment, or compensation; and

"(4) such other matters as the Attorney General may deem appropriate.

Such report shall include the number, type, and disposition of all investigations and prosecutions supervised by such Section or such unit, except that such report shall not disclose information which would interfere with any pending investigation or prosecution or which would improperly infringe upon the privacy rights of any individuals."

(b) The table of sections for chapter 31 of title 28 of the United States Code is amended by adding at the end of the following:

"528. Disqualification of officers and employees of the Department of Justice.

"529. Annual report of Attorney General."

#### EFFECTIVE DATE

SEC. 604. Except as provided in this section, the amendments made by this title shall take effect on the date of the enactment of this Act. The provisions of chapter 39 of title 28 of the United States Code, as added by section 601 of this Act, shall not apply to specific information received by the Attorney General pursuant to section 591 of such title 28, if the Attorney General determines that—

28 USC 591 note.

(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

(2) such specific information is related to a matter which has been presented to a grand jury and is received by the Attorney General within one hundred and eighty days of the date of the enactment of this Act; or

(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within ninety days of the date of the enactment of this Act.



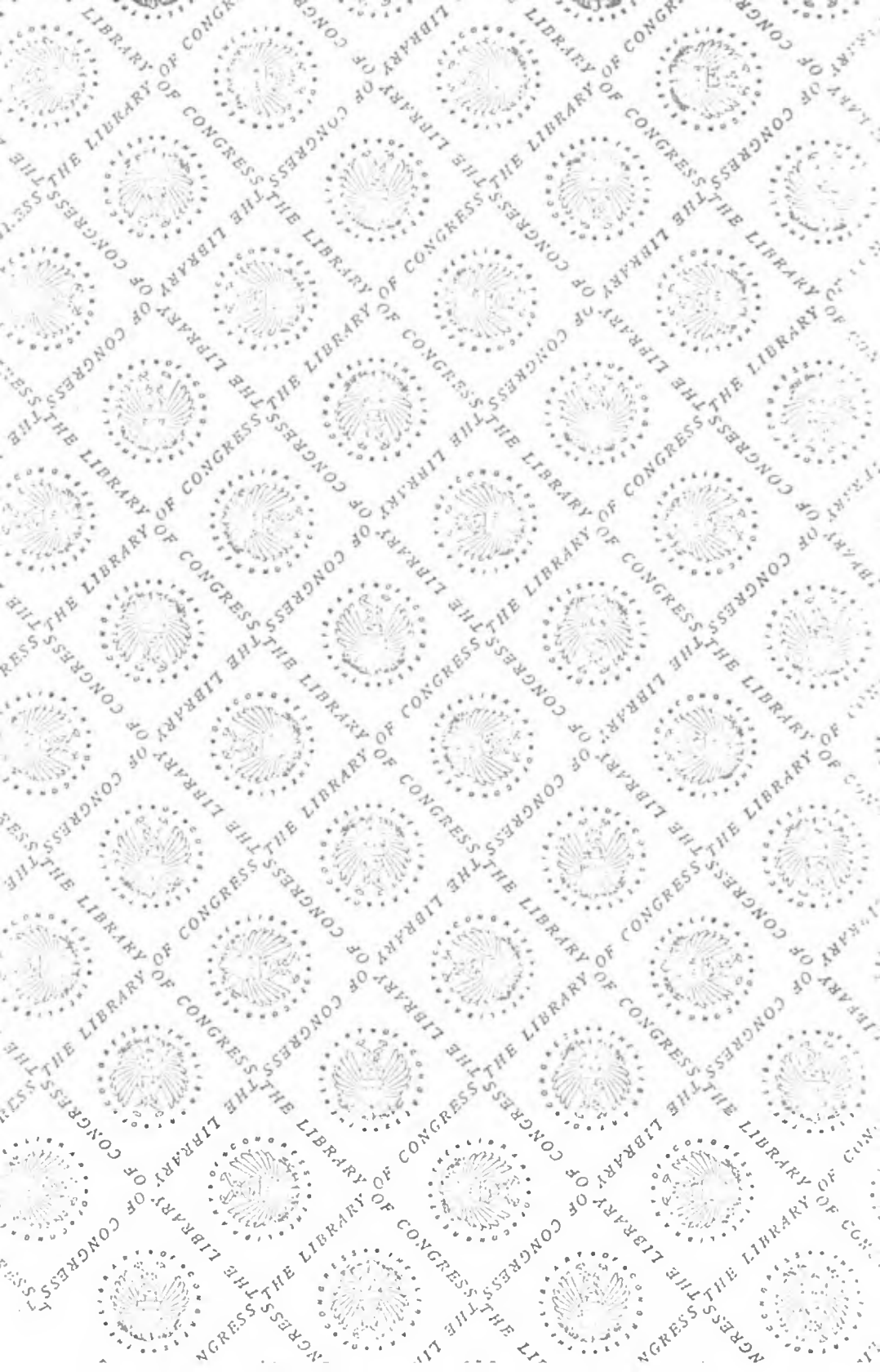


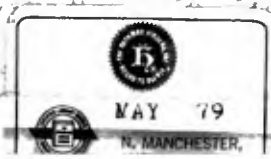
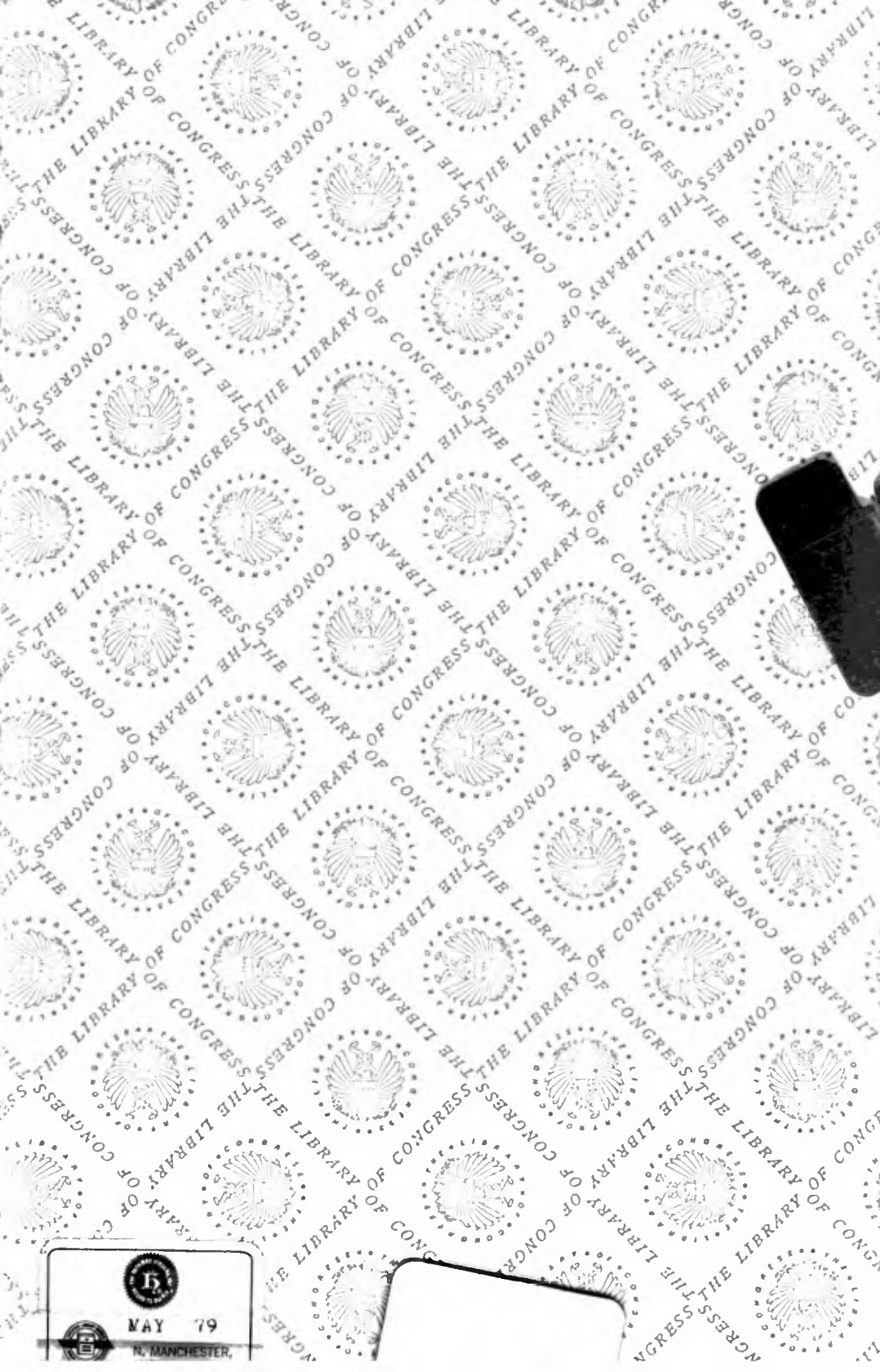












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